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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

COUNTY OF WASHOE, NEVADA;
RICHARD KIRKLAND; and RAY WRIGHT,

Petitioners,

v.

MICHELLE GIBSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether a policy to deny a medical evaluation or treatment to an inmate *while he is combative* constitutes deliberate indifference for purposes of municipal liability.

2) Whether the Ninth Circuit's holding that a policy of not providing an incoming inmate with a medical evaluation while he is combative may be a basis for municipal liability directly conflicts with authoritative decisions of the United States Supreme Court, including *Canton*, *Tuttle*, *Farmer*, and *Monell*.

3) Whether the Ninth Circuit's decision reversing the district court's grant of summary judgment in favor of Washoe County after affirming summary judgment as to the individual defendants, directly conflicts with the authoritative decision of the United States Supreme Court in *Heller*, which provides that a finding that a police officer inflicted no constitutional injury removes any basis for liability against the municipality.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 22, 2002. A timely petition for rehearing en banc was denied by order entered on July 10, 2002. (App. E). This court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

1. Procedural History

Respondent filed the original complaint in this lawsuit on July 11, 1997. The theory of the complaint was that the decedent, Mr. Gibson, had died of positional asphyxia while in custody of the Washoe County, Nevada, jail. See Supplemental Excerpts of the Record (SER), pp. 1-9. On February 2, 1998, appellants filed an amended complaint, Excerpts of the Record (ER), pp. 1-11, adding a number of individual defendants, and replacing the positional asphyxia theory, which had become discredited during discovery, with a new theory referred to as "restraint" or "compression" asphyxia. *See* Amended Complaint, ER, p. 4. The complaint also alleged for the first time that Mr. Gibson's death was the result of deliberate indifference not only to "a serious medical condition" but also to "mental illness of the decedent." Amended Complaint, ER, p. 6. Petitioners answered on March 17, 1998. *See* docket sheet, ER, p. 315. Following extensive discovery, petitioners moved for summary judgment on December 31, 1998. District court docket sheet, ER, p. 315. Respondent opposed the motions on April 2, 1999, and petitioners replied on May 12, 1999. Docket sheet, ER, pp. 315, 316.

On September 7, 1999, United States Magistrate Judge Robert McQuaid entered his report and recommendation in favor of summary judgment. *See* Report and Recommendation, Appendix (App.), pp. 49a-64a. Respondent objected on September 17, 1999, and petitioners opposed the objections. ER, p. 317. On September 28, 1999, the district court issued its order granting summary judgment, App. 46a-48a. Respondent appealed to the Ninth Circuit.

On May 22, 2002, the Ninth Circuit entered its order affirming in part, reversing in part, and remanding. Order, App. 1a-43a. The court affirmed as to all individual deputies, but retained Washoe County, then-sheriff Richard Kirkland, and then-Chief Deputy Ray Wright. On July 10, 2002, the court denied petitioners' petition for rehearing en banc. App. 65a.

2. Statement of Facts

On February 3, 1996, at approximately 3:00 a.m., Washoe County, Nevada, Sheriff's Deputies Anthony Miranda and Richard D. Hodges were on patrol when Deputy Miranda noted a Dodge pickup truck in the parking lot of a Winner's Corner convenience center. Statement of Deputy Miranda, Supplemental Excerpts of the Record (SER), pp. 14-15. Deputy Miranda noticed a male subject, who later turned out to be Mr. Gibson, near the pickup truck, who seemed to be disoriented and not "in complete control of himself." SER, p. 15. Hodges and Miranda pulled into the parking lot of the Winner's Corner. Miranda entered the convenience store, which the subject had also entered, while Hodges became distracted with an unrelated citation outside. See SER, pp. 16-18. Miranda observed Gibson purchase a beer and a cup of coffee. SER, p. 19. At one point, after the clerk placed Gibson's change on the counter, Gibson swept his hand across the counter, swatting the change onto the floor behind the clerk. SER, p. 20. Miranda believed that Gibson might have been under the influence of alcohol, although Miranda could not detect the odor of alcohol. SER, p. 22. Gibson returned to the Dodge pickup truck, but did not get behind the wheel. SER, p. 23. Miranda also left the store and assisted Deputy Hodges with his citation. SER, p. 21. Gibson moved from the cab area of the truck to

the bed several times. He appeared to Deputy Miranda to be avoiding driving away. SER, p. 21. The truck had no license plates. SER, p. 23. After returning to the store for a period of time, Gibson finally drove away. SER, p. 24. Deputy Hodges finished his citation, and he and Deputy Miranda returned to their patrol car. SER, p. 24. At the intersection of North McCarran and Clear Acre they observed Gibson commit a traffic offense, driving straight across the intersection from the left turn lane. SER, p. 27. The deputies pulled Gibson over and requested another deputy to perform a DUI investigation. SER, p. 27. Gibson became belligerent, refusing to comply with lawful commands and refusing to answer questions. SER, pp. 28-29. When Deputy Hodges asked Gibson if he knew where he was, he answered: "Yeah, I'm in the middle of the fucking road because of you guys . . ." SER, p. 33. In response to Deputy Hodges's question whether Gibson knew what time it was, Gibson responded, "Shut the fuck up." SER, p. 34.

Based on his traffic offenses, expired registration, and behavior, the deputies decided to arrest Mr. Gibson. SER, p. 34. Gibson's belligerence escalated. He made a threat to Deputy Miranda that he'd get the deputy when he got out. SER, p. 38. During his transportation to the jail, he began kicking the screen partition behind the front seat of the patrol car. He told Deputy Hodges that he was going to come through the screen and kill the deputy. SER, pp. 41-42. At the jail, he refused to exit the patrol car.

Deputy Jereme Wormington assisted in removing Gibson from the patrol car. He states that Gibson was yelling at the deputies, demanding to be released because the deputies had no right to arrest him. *See* Statement of Deputy Wormington, SER, p. 94. Several deputies had to pull Gibson out of the

vehicle. Gibson at one point tried to knee Deputy Rockwell. SER, p. 95. He refused to walk to the sally port and was carried. SER, p. 96. When deputies searched him in the sally port, he began screaming. SER, p. 97. Deputy Wormington said, "Calm down. We're not going to hurt you." SER, p. 97. Gibson also refused to walk to the photo station. SER, p. 97. As the deputies carried him, he attempted to spit on deputies. SER, p. 98. After photographing Gibson, deputies restrained him with leg restraints and belly chains placed him into Holding Cell (HC) 9. SER, p. 99.

At approximately 4:30 a.m., Gibson slipped out of his belly chains and began hitting them against the cell door. See statement of Sgt. Jon C. Williams, another defendant in this case, SER, p. 83. Williams, with deputies Thomas, Bowlin, and Youngs entered holding cell 9 (HC9) and re-secured the belly chains, slipping them through the belt loops of Gibson's pants. SER, p. 84.

At approximately 6:00 a.m., Gibson once again slipped his chains and was beating them against the cell door. SER, p. 84. Sgt. Williams told him to stop, to which Gibson replied that he would continue to hit the glass "until you guys get me out of here." SER, p. 85. He assumed a fighting stance. SER, p. 86. In order to restrain Gibson again, Sgt. Williams ordered Deputy Bowlin to spray Gibson with pepper spray. SER, p. 86. Despite the pepper spray, Gibson remained extremely combative. SER, p. 87. Sgt. Williams stated that the deputies "couldn't control him. His feet were flailing, his arms were flailing around." SER, p. 87. Initially, Sgt. Williams, Deputies Bowlin, Cook, and Thomas, all named defendants, were present in HC 9. *See* Statement of Deputy Thomas, SER, p. 76. The intent of the deputies was to "restrain him somehow." SER, p. 77. The deputies kept

trying to calm Gibson. SER, p. 77. The deputies removed Gibson from the cell because of the lingering pepper spray. Outside the cell, Gibson continued to fight. SER, p. 87.

More deputies, including Wormington and Youngs, came to assist. SER, p. 79. Thomas took hold of the loose chains. He states that the chains pinched his hands. SER, p. 79. Regarding Gibson's struggling at this point, Thomas stated: "[W]e couldn't control him." SER, p. 79. Sgt. Williams stated: "[the deputies] were all on him trying to control him and they couldn't, he was just extremely, extremely combative." SER, p. 87. Sgt. Williams noted that the reason so many deputies were attempting to restrain Gibson was for Gibson's safety. SER, p. 88. Plaintiff's expert witness on police procedures, D.P. Van Blaricom, agreed that using large numbers of officers to restrain a combative suspect is not improper. Deposition transcript of D.P. Van Blaricom, SER, p. 117a.

Sgt. Williams decided to move Gibson to Special Watch Cell 1 (SW 1), in which was a bench with soft restraints for restraining violent prisoners. SER, p. 87. Gibson was placed in a prone position on the bench. SER, p. 80. He continued to fight, however, making it impossible to strap him down. SER, p. 88. The only restraint that was ever successfully applied was to his left ankle. SER, p. 88. Deputies Bowlin and Cook were attempting to restrain Gibson's legs. See statement of Deputy Bowlin, SER, p. 57; statement of Deputy Cook, SER, p. 73. Sgt. Williams finally succeeded in applying the leg restraint. SER, p. 88. Other deputies were struggling with Gibson, each attempting to control a particular area of Gibson's body. Wormington was at Gibson's head and left shoulder blade. SER, p. 100. Thomas was still attempting to control the loose belly chains. He states that

his hands were "ripped raw" from attempting to hold the chains. SER, p. 80. He obtained a PR-24 baton from Deputy Cloud, and wrapped the chains around it in order to take up slack from the chains. SER, pp. 80-81. Deputy Youngs knelt on Gibson's lower buttock, in an attempt to hold Gibson down SER, p. 103. Deputy Mary Jean Cloud, observing that Gibson was still able to raise himself off the bench, SER, p. 62, got onto the bench and placed her knee on Gibson's back between his shoulder blades. SER, p. 63. Deputy Cloud's position did not interfere with Gibson's breathing and in fact did not even prevent him from rising and continuing to struggle. Deputy Cloud observed that "he was raising me and Deputy Youngs completely up off the bench." SER, p. 63. Deputy Wormington stated: "I remember Deputy Cloud was right to my right on his back and he liked jumped, I mean lifted himself off the bed . . ." SER, p. 104. Sgt. Williams noted that Gibson continued to breathe hard, to struggle and fight, to yell and scream. SER, pp. 90-91.

As soon as the ankle restraint was placed, Gibson went limp. SER, p. 90. Deputy Cloud states that it took her no more than ten seconds to realize that something was wrong. SER, p. 64. The EMT, whose station was within 10 to 15 feet of SW 1, SER, p. 89, was in the cell immediately. SER, p. 89. Gibson had no pulse. CPR was begun and an ambulance called SER, p. 65. Efforts to revive Gibson were unsuccessful. An autopsy was performed by pathologist John N. O'Donnell, M.D., at the Washoe County Coroner's Office. Dr. O'Donnell determined that the cause of death was severe coronary arteriosclerosis. SER, p. 111. He noted an enlarged heart, weighing 470 grams, SER, p. 108, and narrowing of coronary arteries due to atherosclerotic plaque formation. SER, p. 108. The autopsy report notes narrowing of up to 70%. However, Dr. O'Donnell later stated that that figure,

based on his initial observations during the autopsy, were underestimates, and that preserved sections of coronary arteries showed blockages of approximately 80% in the right coronary artery and 90% in the left anterior descending artery. SER, p. 221-22. Dr. O'Donnell states that Mr. Gibson's severe coronary arteriosclerosis was sufficient to account for Mr. Gibson's death in the absence of any other factors. SER, p. 222.

According to the deposition testimony of Michelle Gibson, Mr. Gibson suffered from bipolar disorder and took antipsychotic drugs for the condition. *See* SER, p. 126. He was hospitalized on approximately a yearly basis in connection with his condition. SER, p. 136. Ms. Gibson testified that Mr. Gibson did not like going to the hospital because the presence of other patients made him uncomfortable and he lost income. SER, pp. 136-37. He had a history of violence when in the manic phase of his illness. SER, p. 139 Michelle Gibson testified to several incidents of violence. Approximately a week before his death, he set fire to a vehicle. SER, p. 141. He once destroyed an auto body shop, resulting in his arrest. SER, p. 142. He was required to pay restitution for the damage. SER, p. 143. He struck Michelle Gibson "one time," SER, p. 143. During Christmas of 1995, just weeks before his death, he punched his father in the face. SER, p. 144. Their son, Jeremiah, was frightened of Mr. Gibson when he was in a manic phase. SER, p. 146. Shortly before Gibson's death, Michelle was contemplating leaving him. SER, p. 145. On Tuesday, January 30, 1996, she told him she wanted a divorce. SER, p. 148. The next day, Wednesday, January 31, 1996, at approximately 5:00 or 5:30 a.m., she observed her husband packing clothes. She asked him where he was going. SER, p. 146. In response, he told her to shut up. He brandished a gun and a machete-

like knife, although he did not point either one at her. SER, pp. 146-47. He then left the house, taking Michelle's car. SER, p. 147.

On Thursday, February 1st, Ms. Gibson moved out of her house and into her mother's home. SER, p. 152. She filed a missing person report with Sparks Police Department. That evening, she spoke with Mr. Gibson on the telephone. SER, p. 153. He sounded normal and in control. SER, p. 154. Ms. Gibson then called Washoe County Sheriff's Office because she wanted Mr. Gibson "picked up" and taken to the hospital "to get reevaluated . . ." SER, pp. 155-56. Deputy Matthews of the Sheriff's Office responded to the Gibsons' residence and met with Mr. Gibson. SER, pp. 156-57. Deputy Matthews spoke to Ms. Gibson by phone. She acknowledges that she did not indicate that Gibson was a threat to her. SER, p. 158. Nor did she inform law enforcement of a threat Gibson had made on January 31. SER, p. 156. She did inform Matthews that Gibson should be taken to West Hills Hospital. SER, p. 159. Deputy Matthews telephoned West Hills Hospital and learned that there was no order from any physician for Mr. Gibson to be picked up and taken to the hospital. See affidavit of Michael Matthews, SER, p. 236. Michelle Gibson acknowledged this fact during her deposition:

> Q: But as of Thursday night when Deputy Matthews had found your husband, there was no order or any direction from Dr. Tannenbaum or Dr. Rich to take Stephen into custody, was there?
>
> A: Not that I know of.

SER, p. 165.

She also acknowledged that West Hills Hospital had told Deputy Matthews it had no information regarding picking up Mr. Gibson. SER, p. 159. Deputy Matthews took Gibson to his wife to pick up some medication. Report of Deputy Matthews, SER, p. 193. Deputy Matthews did not believe that Gibson was a threat to himself or others based on his own observations and statements made by Gibson and his wife. Affidavit of Deputy Matthews, SER, pp. 236-37. He therefore returned Gibson to his residence. SER, p. 193.

On Friday, February 2, 1996, Michelle Gibson and Mr. Gibson's mother went to West Hills Hospital to find out what could be done about hospitalizing Mr. Gibson. SER, p. 160. Ms. Gibson obtained a TPO against her husband. SER, p. 162. They went to the District Attorney's Office to see about an involuntary commitment, but decided against that course of action:

> She [a District Attorney's Office employee] had mentioned something that offhand I really don't remember that we could do, and I don't really remember, but his mother and I didn't agree with it because we thought it would have just caused more problems or something trying to get him admitted.

SER, p. 161.

On Friday evening, Michelle Gibson called 9-1-1 and again asked Sparks Police Department to find her husband. SER, p. 166. The purpose, once again, was to have him hospitalized and "reevaluated." SER, p. 166. It appears from the deposition of Reno Dispatch administrative supervisor Toni Giles that Reno Dispatch did broadcast the ATL on Washoe Sheriff's Office's radio frequency. Deposition

transcript of Toni Giles, ER, p. 96. However, neither Deputies Miranda nor Hodges, who stopped Gibson later that night, were aware of the existence of the ATL. *See* deposition transcript of Deputy Miranda, SER, p. 198; deposition transcript of Deputy Hodges, SER, p. 204.

Although the Ninth Circuit contends that Mr. Gibson's combativeness was clearly caused by his mental illness, deputies Miranda and Hodges did not detect a basis for involuntary commitment:

> Q: . . . Does it come up from time to time that the sheriff's office has someone involuntarily committed because of some mental illness?
>
> A: Yes.
>
> Q: And have you personally participated in any situations involving an involuntary commitment?
>
> A: Yes.
>
> Q: So, to that extent, you are familiar with the involuntary commitment statutes, aren't you?
>
> A: I am familiar with what our policies are and the procedure when we encounter somebody that needs, has determined to need an involuntary commitment.
>
> Q: Okay. And in the case of Mr. Gibson, was it your opinion in dealing with him that there was any basis for his involuntary commitment?

A: No.

Q: Why is that?

A: It just seemed like an obnoxious, angry man.

Q: So, his behavior didn't amount to anything that would make you think that there was mental illness?

A: No. I'm obviously not a mental health professional. I've encountered numerous people on the street that are just angry and pissed off because of their encounter with the police. That's what he struck me as, was just somebody who was angry and pissed off.

SER, p. 200.

The above facts were presented to the United States District Court for the State of Nevada by way of motion for summary judgment. On September 7, 1999, United States Magistrate Judge Robert A. McQuaid entered his Report and Recommendations, App. 49a-64a, recommending summary judgment on all federal claims and dismissal without prejudice as to supplemental state claims. The United States District Court adopted the recommendations and granted summary judgment on September 27, 1999. App. 46a.

REASONS FOR GRANTING THE PETITION

I.

THE PANEL'S HOLDING THAT A POLICY OF NOT PROVIDING AN INCOMING INMATE WITH A MEDICAL EVALUATION WHILE HE IS COMBATIVE MAY BE A BASIS FOR MUNICIPAL LIABILITY DIRECTLY CONFLICTS WITH AUTHORITATIVE DECISIONS OF THIS COURT

Respondent brought the instant lawsuit pursuant to 42 U.S.C. § 1983 for violation of Mr. Gibson's substantive due process rights. Ninth Circuit Opinion (hereafter "Opinion"), App. 2a. The panel does not appear to fault deputies Miranda and Hodges for arresting Mr. Gibson. In any event, these deputies were not named as defendants. App. 11a, n. 3. Nor does the panel fault the jail deputies for deliberate indifference or excessive force. App. 38a-43a. The panel affirmed summary judgment as to all individual deputies. The panel additionally recognized that there is no respondeat superior liability in § 1983 litigation, citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). App. 13a. However, the panel ruled that two paths might lead to county liability: where the municipality itself inflicted the injury or where, "in limited situations," the municipality was responsible for a constitutional tort committed by its employee, even though it did not direct the employee to commit the tort. App. 13a-14a.

The panel found that the jail's medical screening policies requiring medical staff to check incoming inmates for obvious signs of sickness or injury, including mental illness "are assuredly constitutional." App. 21a. However, the panel

nevertheless found a policy resulting in potential liability against the county and requiring reversal of summary judgment. The panel's finding regarding this alleged policy is clearly in conflict with decisions of this court and raises questions of exceptional importance. The offending policy, in the words of the panel, is to delay a medical screening "'if the inmate is *combative*, uncooperative or unable to effectively answer questions due to intoxication.'" App. 21a (emphasis added). *See also* App. 36a: "[C]ounty policy forbids medical evaluations on incoming detainees *who are combative and uncooperative* . . . " (emphasis added).

Merely identifying a policy leading ultimately to an injury, as the panel has done, is insufficient to create municipal liability. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791 (1985):

> . . . [S]ome limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official . . .

In the *Tuttle* decision, this court imposed two such limitations. There must be (1) "requisite *fault* on the part of the municipality," and (2) a "causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, *supra*, 471 U.S. at p. 824, 105 S. Ct. at p. 2436 (emphasis added). *Also see Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388,

137 L. Ed. 2d 626 (1997) (a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights). The degree of fault necessary to impose liability on a municipality has in turn been defined as "deliberate indifference." *See City of Canton, Ohio, v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412 (1989). This degree of fault is wholly absent from a policy of failing to give medical attention to a *combative* inmate.

The *Farmer* decision, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), defined "deliberate indifference" further, adding a subjective component. *Farmer* dealt with the state of mind of individual state actors rather than with liability based on municipal policy. Despite acknowledging *Farmer*'s "conceptual difficulty" in searching "for the subjective state of mind of a governmental entity" (App. 20a, n. 9), the panel nevertheless applied the *Farmer* standard in discussing the county's policy. *Farmer*, too, however, is at odds with the panel's decision. The panel stated that under *Farmer*, the county could be liable if it (1) had a policy that posed a substantial risk of serious harm to Gibson; and (2) knew that its policy posed that risk. App. 19a-20a. The panel then held that the policy of failing to treat combative inmates posed such a risk: "This mandatory exception to the County's normal medical screening procedures poses a substantial risk of serious harm to those with certain mental illnesses." App. 21a. In so ruling, the panel came into direct conflict with *Farmer*, which also held:

> In addition, prison officials who actually knew of a substantial risk to inmates health or safety may be found free from liability if they responded

> reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "'reasonable safety,'" [citations] . . . *Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishment Clause.*

Farmer[1], *supra*, 511 U.S. at pp. 844-45; 114 S. Ct. at pp. 1982-83 (emphasis in the original).

Without a doubt, it is reasonable to adopt a policy of not examining an inmate while he is combative. The recitation of facts *supra* clearly demonstrates Mr. Gibson's extreme combativeness. To conduct a medical examination or to attempt to sedate or medicate him while he was combative would have been futile and potentially dangerous not only for Mr. Gibson but for those involved in the effort. The procedures labeled by the panel as a "mandatory policy" in reality merely state the self-evident fact that it is not possible to examine or treat an inmate when he is combative as Mr. Gibson was.

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1. Despite the reference to the Eighth Amendment, the Ninth Circuit applies the "deliberate indifference" standard to pretrial detainees as well, as indeed it did in the instant case. *See Johnson v. Meltzer*, 134 F.3d 1393, 1398 (9th Cir. 1998).

II.

THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S RULINGS REGARDING CAUSATION

As noted above, there must be a "causal connection between the policy and the constitutional deprivation." *Tuttle*, *supra*, 471 U.S. at p. 824, 105 S. Ct. at p. 2436 (emphasis added). Mr. Gibson did not die of mental illness — the condition the panel believes he should have been screened for while he was fighting the deputies. He died of severe coronary arteriosclerosis. App. 27a. The panel did not believe that petitioners' argument regarding this fact went to causation but rather went to foreseeability[2]. App. 27a. In fact, the argument goes to both foreseeability and causation. The panel lightly tossed aside the causation issue with this comment: ". . . [O]n the summary judgment record a jury easily could conclude that the County caused Gibson's death." App. 27a. The United States Magistrate Judge, on the other hand, clearly understood the causation issue:

> Although Plaintiff attempts to shift the focus to decedent's mental health, that is not what resulted

2. The panel recognized that the deliberate indifference doctrine contains a heightened foreseeability requirement. App. 30a. However, the panel then proceeded to reject the standard in favor of a tort standard of foreseeability. Here the panel was once again in clear conflict with authority of this court: "[W]e have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 1070, 117 L. Ed. 2d 261 (1992). The panel's tort-based foreseeability standard is also in clear conflict with *Farmer*'s subjective test for deliberate indifference and *Bryan County*'s "direct causal link" requirement, discussed *infra*.

> in his death. There is no evidence in this record and no testimony from any expert that a risk of failing to adequately treat manic depressive disorder is death because of arteriosclerotic disease.

App. 61a.

The panel's cursory analysis directly conflicts with decisions of this court. The offhand observation that a jury could conclude that the county "caused" Mr. Gibson's death is an example of the sort of tenuous connection rejected by this court as insufficient to result in municipal liability. *See Tuttle*, *supra*, 471 U.S. at p. 823; 105 S. Ct. at p. 2436 : ". . . [I]f one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official . . ." Municipal liability requires more. There must be a "direct causal link" between the municipal action and the deprivation of federal rights. *Bryan County*, *supra*, 520 U.S. at p. 404, 117 S. Ct. at p. 1388. *See also* the following from *Bryan County*, *supra*:

> [A] court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.
>
> * * *
>
> As our decision in *Canton* makes clear, "deliberate indifference" is a *stringent* standard of fault, requiring proof that a municipal actor disregarded a *known* or *obvious* consequence of his action.
>
> * * *

> [A] finding of culpability simply cannot depend on the mere probability that *any* officer inadequately screened will inflict *any* constitutional injury. Rather, it must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.

Bryan County, *supra*, 520 U.S. at pp. 410-12, 117 S. Ct. at pp. 1391-92 (italics in the original, underlining added). The panel, in asserting that death was not the only foreseeable consequence of its "deliberate indifference" (App. 28a). and in making generalized arguments about "prisoners" and their "health problems" ("a jury could conclude that County policymakers knew that inevitably *some prisoners* arrive at the jail with urgent *health problems* requiring hospitalization." App. 25a[3], emphasis added) is clearly in conflict with this court's requirement of a direct causal link between the offending policy and the particular injury suffered by the decedent. The tenuousness of the link in this case is made clear by the panel's unsupported speculation:

> Had the County had a policy instructing the medical staff to use information obtained from a prisoner's medication to screen incoming detainees, the nurse, after observing Gibson's behavior in light of his medication, likely would have concluded that Gibson was in the midst of a manic phase and recommended transporting him

3. Of course, as noted *supra*, the panel finds the jail's policies regarding health services "assuredly constitutional," with the exception of the policy of failing to examine combative inmates. Presumably, the panel's discussion is therefore implicitly limited to "some *combative* prisoners" with "urgent health problems." Even so, however, fault attributable to such generalized policies fails the "direct causal link" standard.

> to a mental hospital. There, Gibson could have received the treatment he needed, rather than face conditions that only made his outlook worse. Alternatively, the nurse could have considered administering the medication on an emergency basis.

App. 37a.

There is nothing in the record to support the panel's belief that Mr. Gibson would have "received the treatment he needed" in a hospital setting[4]. The uncontroverted expert testimony was that Mr. Gibson was asymptomatic for the condition that resulted in his death. *See* the testimony of respondent's expert cardiologist, Harvey L. Alpern, M.D., SER pp. 206-07:

> Q: To your knowledge, do you have any information one way or the other as to whether Mr. Gibson had ever sought or was even aware of this condition and sought treatment for it or was aware of this condition?
>
> A: To my knowledge, he had not, but as I previously indicated, given the obstruction, it's unlikely at this point he would have symptoms.
>
> * * *
>
> Q. Do you have any information indicating that deputies at the Washoe County Jail were aware of his condition?

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4. *Also see* App. 24a, wherein the panel asserts that had he been taken to "a mental hospital, Gibson *almost certainly* would have received the care he needed . . ." (emphasis added).

A. I have no information.

Q. Okay. It would not be very likely that they would be aware of his condition if he and his wife were not aware of his condition, is that correct?

A. That is correct.

Mr. Gibson' combativeness resulted in his death. To administer psychotropic medication, or to transport Mr. Gibson to a hospital, it first would have been necessary to calm Mr. Gibson, which was precisely what the deputies had been attempting from the moment he entered the jail until his death. *See, e.g.*, statement of Deputy Thomas, SER pp. 77-78: "We just tried to get him to calm down. I mean, the whole time Bowlin kept sayin', 'Stop resisting. Just take it easy. We'll try to get you help.'" Furthermore, Ms. Gibson testified that her husband disliked hospitalization and had a history of violence. SER, pp. 136-37, 139. There is nothing in the record to suggest that he would have been any less combative if he had been taken to a hospital rather than to jail. As can be seen, the Ninth Circuit's unsupported speculation regarding what might have happened to Mr. Gibson had he been hospitalized for a mental health issue clearly runs afoul of this court's requirement of a direct causal link necessary to impose municipal liability.

III.

THE PANEL'S "SECOND ROUTE TO MUNICIPAL LIABILITY" ALSO DIRECTLY CONFLICTS WITH AUTHORITATIVE DECISIONS OF THIS COURT

The panel found that a second route to municipal liability would exist pursuant to the criteria set forth in *Amos v. City of Page*, 257 F.3d 1086, 1094 (9th Cir. 2001), if plaintiff could show that (1) a county employee violated Mr. Gibson's rights; (2) the county had customs or policies that amount to deliberate indifference (as that phrase is defined by *Canton*); and (3) that the policies were the moving force behind the employee's violation of Gibson's constitutional rights, in the sense that the county could have prevented the violation with an appropriate policy. The panel's analysis of each of these elements is in conflict with authoritative decisions of the United States Supreme Court.

First, the panel held that a jury could find that the nurse on duty on the night of Mr. Gibson's death "was deliberately indifferent to Gibson's death" as defined by *Farmer*. App. 32a. The panel's analysis of *Farmer* has been demonstrated to be erroneous *supra*. Under *Farmer*, even if a prison official "actually knew of a substantial risk to inmate health or safety," that official is not liable if he responded reasonably to the risk, even if the harm ultimately was not averted. *Farmer*, 511 U.S. at p. 844, 114 S. Ct. 1982-83. There was nothing unreasonable in the fact that a nurse failed to perform medical duties at a time when Mr. Gibson was engaged in his struggles with deputies. To the extent that the panel suggests that the nurse violated Mr. Gibson's rights by merely *knowing* that "hospitalization could have relieved Gibson's condition," App. 33a, this unfounded and erroneous

speculation has been discussed *supra*. Thus, the panel's conclusion that a county employee violated Mr. Gibson's rights is unsupported and conflicts with authoritative decisions of this court.

Turning to the second of the criteria set forth in *Amos*, it has already been demonstrated that the county's policy does not amount to deliberate indifference under the established authority discussed *supra*. Washoe County was clearly not "deliberately indifferent" in failing to medically examine Mr. Gibson while he was combative, since its "policy" reflects the reasonable position that it is not possible to conduct such an examination upon a combative subject. Indeed, there is "considerable conceptual difficulty" in concluding that the failure to examine a *combative* inmate is even a "deliberate" or "conscious choice" of the municipality amounting to a policy. Rather, the combative inmate is preventing the deputies from carrying out the assuredly constitutional policy of the county to provide medical care. For this reason, it was Mr. Gibson, not the county, who was the "moving force" behind his injury, pursuant to the third element of liability in *Amos*. The panel asserts that the "moving force" was the failure of the county to have "a policy directing its medical staff to use information obtained from prisoner's medication to determine whether he should be jailed or hospitalized and, if the former, under what conditions." App. 37a. This holding of course conflicts with the requirement of a "direct causal link" between the policy, or absence thereof, and the injury. The panel's decision is therefore in clear conflict with the authoritative decisions of the United States Supreme Court.

IV.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH HELLER

The general rule, as acknowledged by the panel at footnote 7 of its opinion, is that if individual deputy defendants are not liable for violating a party's constitutional rights, then the municipality is correspondingly absolved of liability. App. 15a. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 1573, 89 L. Ed. 2d 806 (1986). The panel observed, however, that the general rule was subject to exceptions. For example, municipal liability may exist even if an officer is entitled to qualified immunity, *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), or where liability cannot be ascribed to a single individual officer. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). But neither of these exceptions is relevant to the instant case, since the panel found that the deputies, individually and collectively, acted reasonably and did not use excessive force or display deliberate indifference. App. 38a-42a. In disregarding *Heller*, the panel found that the county could be held liable on the theory that the county, rather than some employee, directly acted against Mr. Gibson:

> The County's violations, as we develop later, involved the decision to commit Gibson to the custody of the jail deputies despite his mental illness, and to do so with no direction to treat that illness while he was in jail or to handle him specially because of it.

App. 16a, n.7.

Of course the "county" made no such decision to commit Gibson to the custody of jail deputies. Individual deputies, Miranda and Hodges, arrested Mr. Gibson for a traffic offense. App. 6a. Under the facts of this case, therefore, there can be no municipal liability:

> If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.

Heller, *supra*, 475 U.S. at p. 799, 106 S. Ct. at p. 1573.

This reasoning follows from *Monell*, which holds that there is no respondeat superior liability in § 1983 and that municipalities can be held liable only for their policies giving rise to liability, not for "direct acts." Indeed, a municipality acts only through employees. Because individual county employees — who have been absolved by the Ninth Circuit — made the decisions regarding the handling of Mr. Gibson, the panel's assessment of potential liability against Washoe County is clearly in direct conflict with *Heller* and *Monell*.

CONCLUSION

The Ninth Circuit's *Gibson* opinion is a published decision. *See Gibson v. County of Washoe*, 290 F.3d 1175 (9th Cir. 2002). In ruling that a law enforcement agency's policy of failing to give medical attention to an inmate while he is combative may violate the inmate's constitutional rights, the Ninth Circuit has announced a rule that not only conflicts with numerous rulings of this court, but will also result in harm to jail staff and to combative arrestees and inmates in prisons and jails throughout the Ninth Circuit. This unfortunate decision will lead to efforts to involuntarily sedate or otherwise treat fighting inmates without first safely securing and calming them — the goal being pursued by the Washoe County deputies at the time of Mr. Gibson's tragic death. It is inconceivable that this court, in formulating its body of caselaw regarding municipal liability, has intended to create liability under such circumstances. Petitioners therefore respectfully request that the court grant the instant petition for writ of certiorari in order to rectify the Ninth Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SUBMITTED APRIL 12, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-17338

D.C. No. CV-97-00410-DWH/RAM

MICHELLE GIBSON,

Plaintiff-Appellant,

v.

COUNTY OF WASHOE, Nevada; RICHARD KIRKLAND, Washoe Co. Sheriff; RAY WRIGHT, Washoe Co. Chief Deputy Sheriff; JOHN WILLIAMS, Washoe Co. Supervising Sgt.; ROB BOWLIN; JEREME WORMINGTON; MICHELE YOUNGS; SCOTT THOMAS; ROBERT COOK; MARY JEAN CLOUD, individually and in their capacities as deputy sheriffs of Washoe Co.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Nevada
David Warner Hagen, District Judge, Presiding

Appendix A

Argued and Submitted
April 12, 2001 — San Francisco, California

Filed May 22, 2002

Before: Stephen Reinhardt, A. Wallace Tashima and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon:
Concurrence by Judge Reinhardt

OPINION

BERZON, Circuit Judge:

On February 3, 1996, Stephen Gibson suffered a heart attack and died while in the custody of the Washoe County, Nevada, Sheriff's Department. Gibson's wife Michelle ("Ms.Gibson") brought this lawsuit under 42 U.S.C. § 1983, on behalf of herself, their two children, and Gibson's estate, against the County, the sheriff, and a number of the sheriff's deputies who were on duty at the Washoe County jail the night Gibson died. Ms. Gibson contended in the district court that the County and the individual defendants violated Gibson's substantive due process rights by the manner in which they treated him on the night he died. She now appeals from the district court's grant of summary judgment for the defendants. We affirm with regard to the individual officers and, in part, with regard to the County. We conclude, however, that summary judgment was improperly granted on the question whether the County was deliberately indifferent to Gibson's mental illness while he was in custody at the county jail.

Appendix A

Because this appeal follows a grant of summary judgment for the defendants, review is de novo. To determine whether there is a genuine issue of material fact, we take into account all the reasonable inferences that favor the non- moving party. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002).

I. Background

A. *Gibson's Death*

1. *The "Attempts To Locate"*

Stephen Gibson suffered from manic depressive disorder. He had been hospitalized several times for the disorder from 1991 until his death in 1996, and was in the regular care of a psychiatrist, Dr. Tannenbaum, at the time of his death. Dr. Tannenbaum prescribed medications to help Gibson control his illness.

In late January, 1996, Gibson was entering a manic phase. Early on the morning of Wednesday, January 31, he was pacing agitatedly through his home, pointing his gun at the walls and twirling a large knife in his hands. Gibson then packed his clothes and left the house, refusing to tell Ms. Gibson where he was going. When she suggested that he take one of the sedatives that he often used during his manic phases, he told her to shut up and said that he would "take her up to the mountains." Interpreting this statement as a threat to her safety, Ms. Gibson packed her things, gathered the children, and went to her in-laws' home. Ms. Gibson also contacted West Hills Hospital to make arrangements for Gibson's admission.

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Over the next two days, Ms. Gibson called the police several times — once in the company of Dr. Rich, the psychiatrist on call at West Hills — in an effort to find Gibson and have him taken to the hospital. Four dispatches were broadcast over the Reno[1] and Washoe County police frequencies:

On February 1 at 9:33 PM, a notice was broadcast, providing Gibson's name and description and describing him as missing and endangered. The broadcast stated that Gibson was "a manic depressive on several medications, [reported] to have a loaded 10-32 with him and does not like police officers."

On February 2 at 3:58 PM, an "attempt to locate" ("ATL") dispatch was broadcast, stating that Gibson was manic depressive, had threatened to kill his wife, and might be armed with a gun or knives.

At 5:15 PM that same day, another ATL was broadcast, describing Gibson and stating that, in accord with the directions of his doctor, Dr. Rich, he should be brought to West Hills Hospital for emergency commitment. This ATL was rebroadcast at 10:39 PM.

2. *The Arrest*

Just after 3:00 AM on February 3, Washoe County deputies Anthony Miranda and Richard Hodges encountered Gibson outside a convenience store. Gibson left his truck

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1. Washoe County contracted with the City of Reno for its police dispatch services.

running with the lights on and the driver's door open while he went into the store. Miranda followed him inside. Gibson bought a beer, a cup of coffee, and a pack of cigarettes, and as he paid for them, flung his change across the counter past the cashier. Miranda thought Gibson might be drunk, but smelled no alcohol on him.

Gibson left the store and continued to behave strangely. He wandered around the parking lot near his truck for about 20 minutes and returned to the store several times. Gibson eventually got into the truck, which did not have license plates, and drove away. The deputies, who believed that Gibson was possibly driving under the influence of alcohol or drugs, observed Gibson attempt to turn out of the parking lot, then back up and try the turn again, this time successfully. Gibson then drove out of the deputies' sight. The deputies left the parking lot and caught up with Gibson, in time to observe him drive straight through an intersection from a left-turn lane. The deputies then radioed dispatch that they were stopping a possible DUI driver and pulled Gibson over. Although Gibson promptly stopped, he refused to turn off the ignition or to leave the truck when the deputies requested him to do so.

Because Gibson refused to get out of the truck, Hodges opened the driver's door, grabbed Gibson's arm, and pulled him from the truck. Although he was shouting obscenities and yelling that the police were going to plant something in his truck, Gibson then became physically cooperative, stepping toward the patrol car with his hands on his head as directed.

Appendix A

Hodges administered a field sobriety test. Gibson was adamant that he had not been drinking, but agreed to the test, peppering the officers with obscenities all the while. Gibson's behavior made administration of the test difficult. Finally, after Gibson told Hodges to "shut the fuck up," the deputies had enough, and placed Gibson under arrest.

Miranda and Hodges had not heard the ATL about Gibson when it was broadcast earlier that evening. During the course of the arrest, the deputies called in to their dispatcher to check Gibson's name and the truck's registration against various crime databases. Although the dispatcher performed these checks and reported back to the deputies, the dispatcher did not notify the deputies that Gibson was the subject of an outstanding ATL directing that Gibson be taken to West Hills for emergency commitment.

When Hodges searched Gibson's truck after the arrest, he located several prescription medication containers with Gibson's name on the label. Although he did not recognize the names of the drugs, Hodges suspected that they were "psych meds," and that Gibson might not be taking his medication.

During the arrest, Gibson was physically cooperative with the deputies as they handcuffed him, but continued to swear at them. After the deputies put Gibson in the patrol car and headed for the Washoe County jail, however, Gibson became physically combative, kicking the partition between the car's front and back seats. The deputies called ahead to the jail to notify the officers there that they were bringing in a combative suspect.

Appendix A

3. *The Jail*

When Deputies Miranda and Hodges arrived at the Washoe County Jail with Gibson, he refused to get out of the patrol car. Four deputies pulled Gibson from the car and carried him into the jail's sally port, the vestibule to the jail's booking area where incoming arrestees are searched. There, they placed Gibson face down on the floor. As the officers searched Gibson, he repeatedly called out, "Help me, Jesus." The officers restrained Gibson with a waist chain, wrist chains, and leg irons, and dragged him through the booking area. After Gibson was photographed and booked, the officers placed him, alone, in a holding cell.

Meanwhile, Hodges and Miranda completed their paperwork, and, consistently with County policy, delivered the drug containers Hodges found in Gibson's truck to the nurse on duty. The nurse confirmed to Deputy Miranda that the medications were to stabilize somebody who was suffering from mental illness. As far as the record shows, however, no one else on duty at the jail that night was told about the likelihood that Gibson suffered from a mental illness, and, aside from conclusions that could be drawn from Gibson's behavior, no one else had reason to suspect that Gibson so suffered.

Twice during the night, Gibson slipped out of his waist chain. The first time, the deputies on duty entered Gibson's cell and replaced the chain with little difficulty. Later, around 6:00 in the morning, Gibson slipped out of the chain again, and banged it repeatedly against the window in his cell door. This time, Sgt. John Williams, who was in charge that night, decided that Gibson should be further restrained. As several

deputies readied to enter the holding cell, Gibson assumed a fighting stance with his fists up and shouted obscenities at them.

Because Gibson was so difficult to control, Williams then gave the order to transfer him to a special watch cell containing a bench with attached soft restraints and a helmet. Williams opened the cell door as Deputy Robert Bowlin quickly sprayed Gibson in the face with pepper spray. The officers shut the cell door as Gibson fell to his knees, screaming that the spray was burning him. Deputies Bowlin, Scott Thomas, and Robert Cook entered the holding cell and grabbed Gibson; the three officers held Gibson down, while more deputies came to help take Gibson from the holding cell.

Several deputies dragged Gibson into the special watch cell and shifted him up onto the bench. As Gibson lay face down on the bench, Deputies Michelle Youngs and Mary Jean Cloud climbed onto his back and legs, while the other deputies helped restrain his arms and legs. Gibson continued to struggle. In Deputy Jeremy Wormington's words,

> We put him on his stomach. And he was still at this point kicking and screaming and fighting and everything and yelling at us and he was, for being pepper sprayed twice . . . this guy had an incredible amount of fight in him. I mean just huge amount of fight 'cause here were are, at this time, I don't remember how many deputies were on him, but I was trying to control his head, his left shoulder blade, his left forearm, and I remember Deputy Cloud was right to my right on his back and he like jumped, I mean lifted himself off the bed . . .

> I mean, this guy was fighting. And all of a sudden for some reason I looked at his head and I looked at Cloud and we looked down and Cloud's like, "Get a pulse."

An on-site paramedic and several of the deputies immediately administered CPR. Several minutes later, a team of paramedics arrived and took Gibson to St. Mary's Hospital, but Gibson never revived.

According to an autopsy report, the immediate cause of Gibson's death was severe arteriosclerosis, a disease of which neither he nor Ms. Gibson had been aware. The defendants' medical expert testified that the "entire milieu" of Gibson's uncontrolled manic state and the officers' efforts to restrain him "resulted in a physiologically stressful state for Mr. Gibson, which essentially resulted in a heart attack."

B. *The County's Policies*

Washoe County has numerous detailed, written policies and procedures concerning the intake of detainees at the jail. Most pertinent here are those policies and procedures relating to the medical evaluation of incoming detainees. (Other policies are described later in this opinion.)

First, upon bringing an arrestee into the sally port, a deputy must "visually assess the prisoner . . . for any obvious signs of sickness or injury requiring medical attention." The jail's nursing staff also evaluates "all inmates, upon arrival . . ., for any obvious signs of sickness or injury requiring immediate

medical attention."[2] The medical screening process to be conducted by a medical staff member consists of several steps: a visual assessment of the inmate, filling out a medical questionnaire, completion of a suicide prevention screening form, and completion of a treatment consent form. If the jail is unable to provide the medical care that a prisoner needs, the medical staff may reject the prisoner, and the prisoner will be taken to a hospital. However, this "Medical Screening process will be delayed if the inmate is combative, uncooperative or unable to effectively answer questions due to intoxication."

Second, "[i]f the prisoner has prescription medication, the intake nurse will be requested to evaluate the medication and make a determination whether the medication is placed in secured property or in the Infirmary for follow up care."

In addition, County policy requires that the jail's medical unit be staffed twenty-four hours a day by licensed medical personnel. The medical staff has sole responsibility for determining if "the prisoner is accepted or refused into the facility due to medical reasons." Until 1995, the County also had employed, through the state's institution for the criminally insane, a full-time clinical mental health worker at the jail to perform mental health screenings of inmates. From 1995 until1999, however, there was no mental health

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2. The County's procedures regarding when the jail's medical staff should evaluate incoming detainees appear somewhat to contradict one another. One procedure states that the nursing staff will be requested to make an evaluation "[i]f the prisoner has visible or claimed injuries." Another procedure states that a medical staff member "will check *all* inmates, upon arrival to the facility." (emphasis added).

worker at the county jail to perform this function, because of a soured relationship between the jail's medical staff and the mental hospital. At the time that Gibson died in the County's custody, consequently, the County did not screen detainees at the jail. The mental health evaluation service resumed in 1999 after, in Sheriff Kirkland's words, the sheriff's department "patch[ed] up those bad feelings."

II. This Litigation

Ms. Gibson, on behalf of herself, her husband's estate, and her children, filed a complaint under 42 U.S.C. § 1983 against Washoe County, and, in their official and individual capacities, the county sheriff, the chief deputy sheriff, a supervising sergeant, and several deputies who were on duty at the jail the night that Gibson died.[3] She alleged three causes of action: (1) that the individual deputies used excessive force on Gibson in violation of his due process rights; (2) that the individual deputies showed deliberate indifference to Gibson's serious mental health condition in violation of his substantive due process rights; (3) that the individual deputies' actions resulted from policies, practices or customs of the Washoe County sheriff's department, and these policies, practices or customs caused and/or contributed to Gibson's death, in violation of his due process rights.[4]

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3. Deputies Miranda and Hodges, who arrested Gibson, were not named as defendants, nor was the nurse on duty.

4. Ms. Gibson also alleged a § 1983 cause of action for deprivation of her liberty interest in her husband's consortium, and two state-law negligence claims. The district court granted the defendants' motion for summary judgment on the consortium claim and declined

(Cont'd)

In addition to the County policies described above, Ms. Gibson asserted that several other policies contributed to Gibson's death. She contended that the lack of a system for communicating outstanding ATL's from one shift to another, and from deputies on patrol to deputies or medical staff at the jail, revealed deliberate indifference to the constitutional rights of the mentally ill. Ms. Gibson also argued that the County failed adequately to train its deputies in recognizing and handling mentally ill individuals whom they encountered in the course of their duties.

The district court referred the disposition of the defendants' motion for summary judgment to a magistrate judge, who recommended granting the motion as to all of Ms. Gibson's claims. First, the magistrate judge determined that the inadequacies in communicating ATL's could not give rise to a constitutional violation because the county lacks any duty to provide competent emergency services to the general public, citing *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989). Second, citing *City of Canton v. Harris*, 489 U.S. 378 (1989), the magistrate judge concluded that Ms. Gibson's allegations that the County failed adequately to train its sheriff's deputies in recognizing and dealing with mentally ill individuals lacked merit. There was no evidence of a pattern of constitutional violations resulting from failure to recognize detainees' mental illnesses, the magistrate judge concluded, nor was the need to train deputies in recognizing and dealing with mentally ill individuals "so obvious" that the failure to do so was likely to result in constitutional violations.

(Cont'd)

to exercise supplemental jurisdiction over the state-law claims. *See* 28 U.S.C. § 1367(c). Ms. Gibson has not appealed these rulings.

Third, characterizing Gibson's serious health condition not as his mental illness but as his severe heart disease, the magistrate concluded that the individual defendants did not show deliberate indifference to his health. Finally, the magistrate judge rejected the contention that the individual defendants had used excessive force in moving Gibson from his holding cell and restraining him in the special watch cell.

After considering and rejecting Ms. Gibson's objections to the magistrate's report and recommendation, the district court granted the defendants' motion for summary judgment. Ms. Gibson appeals.

III. Analysis

I. County Liability

A municipality may be held liable under a claim brought under § 1983 only when the municipality inflicts an injury, and it may not be held liable under a respondeat superior theory. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978).

A. Two Paths to County Liability

At least two routes can lead to the conclusion that a municipality has inflicted a constitutional injury. First, a plaintiff can show that a municipality itself violated someone's rights or that it directed its employee to do so. *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1994). Alternatively, in limited situations, a plaintiff can demonstrate that a municipality is responsible for a constitutional tort committed by its employee, even though

it did not direct the employee to commit the tort. *Id.*, at 406-07; *Canton*, 489 U.S. at 387.

Under one route to liability, a municipality may be liable under § 1983, just as natural persons are, because when Congress enacted § 1983 it "intend[ed] municipalities and other local government units to be included among those persons to whom § 1983 applies."[5] *Monell*, 436 U.S. at 689. To show that the municipality violated someone's rights or instructed its employees to do so, a plaintiff can prove that the municipality acted with "the state of mind required to prove the underlying violation," just as a plaintiff does when he or she alleges that a natural person has violated his federal rights. *Board of County Comm'rs*, 520 U.S. at 405. Examples of this direct path to municipal liability include: a city's policy of discriminating against pregnant women in violation of the Fourteenth Amendment, *Monell*, 436 U.S. 658; a policy-maker's order to its employees to serve capiases[6] in violation

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5. Section 1983 states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

6. "A capias is a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt." 475 U.S. at 472 n.1.

of the Fourth Amendment, *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); and a county policy that policymakers know will place aggressive and passive homosexuals in the same jail cell in violation of the passive homosexual's Fourteenth Amendment right to personal security. *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc).[7]

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7. The municipal defendants (the County and its policy-makers, Sheriff Kirkland and Chief Deputy Sheriff Wright) assert that if we conclude, as we do, *see infra*, that the individual deputy defendants are not liable for violating Gibson's constitutional rights, then they are correspondingly absolved of liability. Although there are certainly circumstances in which this proposition is correct, *see City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) and *Quintanilla v. City of Downey*, 84 F.3d 353, 355 (9th Cir. 1996), it has been rejected as an inflexible requirement by both this court and the Supreme Court. For example, a municipality may be liable if an individual officer is exonerated on the basis of the defense of qualified immunity, because even if an officer is entitled to immunity a constitutional violation might still have occurred. *See, e.g., Chew v. Gates*, 27 F.3d 1432, 1438-39 (9th Cir. 1994). Or a municipality may be liable even if liability cannot be ascribed to a single individual officer. *Owen v. City of Independence*, 445 U.S. 622, 652 (1980) (a " 'systemic' injury" may "result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.") (citation omitted). And in *Fairley v. Luman*, 281 F.3d 913 (9th Cir. 2002), we explicitly rejected a municipality's argument that it could not be held liable as a matter of law because the jury had determined that the individual officers had inflicted no constitutional injury. *Id.* at 916. "If a plaintiff established he suffered constitutional injury *by the City*, the fact that individual officers are exonerated is immaterial to liability under § 1983." *Id.* (emphasis in original); *see also Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992).

(Cont'd)

Under a second route to municipality liability, a plaintiff need not allege that the municipality itself violated someone's constitutional rights or directed one of its employees to do so. Instead, a plaintiff can allege that through its *omissions* the municipality is responsible for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation. *Canton*, 489 U.S. at 387-89. However, because *Monell* held that a municipality may not be held liable under a theory of respondeat superior, a plaintiff must show that the municipality's deliberate indifference led to its omission and that the omission caused the employee to commit the consti-tutional violation. *Id.* at 387. To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation. *Farmer v. Brennan*, 511 U.S. 825, 841 (1994). Compared to the more direct route to municipal liability discussed above, "much more difficult problems of proof" are presented in a case where a city employee acting under a constitutionally valid policy violated someone's rights. *Board of County Comm'rs*, 520 U.S. at 406.

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In any event, in this case, the constitutional violations for which we hold the County may be liable occurred *before* the actions of the individual defendants at the jail, so the County is not being held liable for what those deputies did. The County's violations, as we develop later, involved the decision to commit Gibson to the custody of the jail deputies despite his mental illness, and to do so with no direction to treat that illness while he was in jail or to handle him specially because of it.

As the record now stands in the case currently before the court, Ms. Gibson may be able to demonstrate municipal liability under either route described above. There is evidence from which a jury could properly conclude that the County itself violated Gibson's rights under the Constitution. In addition, there is also evidence from which a jury could properly conclude that the County's failures to act caused its employee to violate Gibson's rights, and that those failures amounted to deliberate indifference under *Canton*.

B. The First Route to Municipal Liability

Inconsidering whether a municipality itself violated a person's rights or directed its employee to do so, the focus is on the municipality's "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (quoting *Monell*, 436 U.S. at 690). In this case, drawing all reasonable inferences from the record in favor of Ms. Gibson, we conclude that the County's policies and procedures regarding medical evaluations of incoming detainees violated Gibson's constitutionally protected right to receive medical care while in the custody of the County. Before explaining why the policies violated this right, we first describe the right in more detail.

1. The Right to Medical Care While in Custody

Ms. Gibson alleges that the County violated Gibson's right to receive adequate medical care while in the custody of the County. Because Gibson had not been convicted of a crime, but had only been arrested, his rights derive from the due process clause rather than the Eighth Amendment's

protection against cruel and unusual punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998); *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996).

With regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes: "persons in custody ha[ve] the established right to not have officials remain deliberately indifferent to their serious medical needs." *Carnell*, 74 F.3d at 979. This duty to provide medical care encompasses detainees' psychiatric needs. *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1461 (9th Cir. 1988), *vac'd*, 490 U.S. 1087 (1989), *opinion reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990); *see also Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983); *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980). In order to comply with their duty not to engage in acts evidencing deliberate indifference to inmates' medical and psychiatric needs, jails must provide medical staff who are "competent to deal with prisoners' problems." *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982).

Under the Eighth Amendment's standard of deliberate indifference, a person is liable for denying a prisoner needed medical care only if the person "knows of and disregards an excessive risk to inmate health and safety."[8] *Farmer*, 511 U.S. at 837. In order to know of the excessive risk, it is

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8. Because the Eighth Amendment's deliberate indifference standard looks to the subjective mental state of the person charged with violating a detainee's right to medical treatment, it — somewhat confusingly — differs from the *Canton* deliberate indifference

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not enough that the person merely "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, [ ] he must also draw that inference." *Id.* If a person should have been aware of the risk, but was not, then the person has not violated the Eighth Amendment, no matter how severe the risk. *Jeffers v. Gomez*, 267 F.3d 895, 914 (9th Cir. 2001). But if a person is aware of a substantial risk of serious harm, a person may be liable for neglecting a prisoner's serious medical needs on the basis of either his action or his inaction. *Farmer*, 511 U.S. at 842.

2. The Policy

When viewed in the light most favorable to Ms. Gibson, the record demonstrates that the County's failure to respond to Gibson's urgent need for medical attention was a direct result of an affirmative County policy that was deliberately indifferent, under the *Farmer* standard, to this need.[9] To find

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standard, which we also apply in this opinion. The *Canton* deliberate indifference standard does not "turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation;" instead it is used to determine when a municipality's omissions expose it to liability for the federal torts committed by its employees. *Canton*, 489 U.S. at 388 n.8; *see also Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992). As opposed to the *Farmer* standard, which does not impose liability unless a person has actual notice of conditions that pose a substantial risk of serious harm, the *Canton* standard assigns liability even when a municipality has constructive notice that it needs to remedy its omissions in order to avoid violations of constitutional rights. *Farmer*, 511 U.S. at 841 (explicitly distinguishing the two standards on this basis).

the County liable under *Farmer*, the County must have (1) had a policy that posed a substantial risk of serious harm to Gibson; and (2) known that its policy posed this risk.[10] *Id.* at 837.

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9. Because that is so, we do not address whether it is necessary to prove the subjective *Farmer* state of mind in suits against entities rather than individuals. *Cf. Farmer*, 511 U.S. at 841 ("considerable conceptual difficulty would attend any search for the subjective state of mind of a government entity, as distinct from that of a government official").

Similarly, we do not consider whether there are instances in which pretrial detainees, as opposed to convicted prisoners, may establish a constitutional violation without meeting the *Farmer* deliberate indifference standard. *Frost* applied the *Farmer* standard by analogy to the due process rights of pretrial detainees, but does not indicate whether the subjective standard applies in all such instances. *See Frost*, 152 F.3d at 1128-30.

Farmer explained that the protections provided to convicted prisoners are limited because of the presence of the word "punishments" in the Eighth Amendment, basing the subjective standard on the need to prove "punishment." *Farmer*, 511 U.S. at 838-39; *see also Wilson v. Seiter*, 501 U.S. 294, 300 (1991). This limiting word does not, however, appear in the Fourteenth Amendment, and pretrial detainees, not having been convicted, are not subject to punishment. Furthermore, the Fourteenth Amendment ensures that states will provide not only for the medical needs of those in penal settings, but for anyone restricted by a state from obtaining medical care on his own. *DeShaney*, 489 U.S. at 200; *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment.

10. As noted in the previous footnote, the Supreme Court has commented that it is difficult to determine the subjective state of

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On the present record, a jury could conclude that the County's medical screening policies not only posed a substantial risk of serious harm to Gibson, but in fact caused him serious harm. The County's written "Medical Screening" procedures require its medical staff to "check all inmates, upon arrival to the facility, for any obvious signs of sickness or injury requiring medical attention." If an inmate needs medical attention that only a hospital can provide, the County's policy is to take the prisoner to the hospital. According to Washoe County Undersheriff Raymond Wright, this policy also required the medical staff to screen "incoming folks for . . . mental illness." Standing alone, these policies are assuredly constitutional. But there is a critical exception to these procedures: "The Medical Screening process *will be delayed* if the inmate is combative, uncooperative or unable to effectively answer questions due to intoxication." (emphasis added).

This mandatory exception to the County's normal medical screening procedures poses a substantial risk of serious harm to those with certain mental illnesses. There is evidence in the record that a common symptom of someone in a manic state is that they are combative and uncooperative.

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mind of a government entity. *Farmer*, 511 U.S. at 841. This statement does not, however, *preclude* the possibility that a municipality can possess the subjective state of mind required by *Farmer*. First, it is certainly possible that a municipality's policies explicitly acknowledge that substantial risks of serious harm exist. Second, numerous cases have held that municipalities act through their policymakers, who are, of course, natural persons, whose state of mind can be determined. *See, e.g.*, *Board of County Comm'rs*, 520 U.S. at 403-04 (citing *Monell*, 436 U.S. at 694).

Gibson exhibited that symptom when the police brought him to the jail. *Because* Gibson was combative and uncooperative, no medical evaluation took place,[11] although the police did conduct other booking procedures, such as searching Gibson and photographing him. Stated differently, it was Gibson's urgent medical need that made him combative and uncooperative, and because Gibson was combative and uncooperative County policy directed the jail's medical staff not to evaluate Gibson to determine if he had an urgent medical need. As a result, Gibson's serious medical needs went untreated, Gibson was jailed rather than hospitalized, and the police treated Gibson as if he were either intoxicated or, as Deputy Miranda stated, "just somebody who was angry and pissed off."

This failure to identify Gibson's urgent medical needs was exacerbated by another County policy regarding prescription medication found with incoming detainees. Under this policy, an officer who discovers medication is to turn it over to a medical staff person, who, in turn, is to place the medication either in "secured property" or "in the Infirmary for follow up care." In accordance with this policy, Deputy Hodges, one of the arresting officers, gave the three containers of prescription psychotropic medication bearing Gibson's name that he found in Gibson's truck to a medical staff member, informing her that he believed the medication was

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11. Counsel for the County stated at oral argument: "The policy is to do a medical evaluation when the person comes in. . . . Mr. Gibson prevented that from happening by being combative so they put him in a place to calm him down. He didn't calm down. He escalated the situation."

psychotropic.[12] Because the County's directives regarding medication did not include using the medication to determine and alleviate the arrestee's *immediate* medical needs, no one at the jail responded to Gibson's urgent need of medical treatment.

Had the medical staff performed a medical evaluation of Gibson to see if he had a medical condition requiring immediate attention, it could have directed the police to take Gibson to the mental hospital. An evaluation by a trained medical staff member surely would have revealed Gibson's condition. Not only did the medical staff have the clues provided by the psychotropic medication, but Gibson's behavior at the jail was so bizarre that numerous deputies, untrained to diagnose someone in a manic state, took special note of it.[13]

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12. Deputy Hodges stated that he said to the nurse: "Here, they were in the truck. I don't if he's taking them. I don't know if they are psychotropics or what." Then, according to Hodges, the nurse told him that "they were mental health kinds of medicines that would stabilize somebody."

13. Deputy Hodges stated that because of Gibson's "mood swings" he believed that Gibson "was mentally ill and wasn't taking his meds, or he was on some kind of drug." Deputy Eric Nagl stated "it was weird how he was acting" and that his behavior "was almost like a light switch." And Deputy Mike Garrow stated that Gibson's cursing was not of "the type that you hear from someone that's just . . . drunk . . . this was someone that was obviously upset . . . and irrational, incoherent . . . not incoherent to where you can't hear . . . or understand what they're saying, but incoherent to making sense."

Finally there is evidence in the record to support the inference that if the medical staff had evaluated Gibson, prevented him from entering the jail, and directed him to a mental hospital, Gibson almost certainly would have received the care he needed, rather than face conditions that worsened his outlook. Following Gibson's death the State of Nevada conducted an investigation and interviewed Gibson's psychiatrist, Dr. Tannenbaum, about Gibson and his condition. Dr. Tannenbaum stated that when a person "becomes out of control" due to a manic phase, staff are "always able to manage them in our hospital setting." However, people in a manic state do not do "real well with any type of authority." Because of this vulnerability, people in a manic state are at a particular risk in a penal setting if their situation goes unidentified. "[A] person in the manic state may look like one of the worst . . . criminal[s] you have, but they're a sick person who we can treat easily and . . . [who] can easily die in a prison system." As a result, the County's policy of not evaluating incoming detainees who were combative, even when the medical staff had access to medications that would facilitate such an evaluation, posed a particular risk to people — such as Gibson — suffering from a manic state.

The County's liability, however, hinges not only on the existence of a policy that poses a substantial risk of serious harm, but also on whether the County was aware of this risk. *Farmer*, 511 U.S. at 837. Although direct evidence of a person's mental state rarely exists, it is not always necessary to prove a person's subjective awareness, as this inquiry is "subject to demonstration in the usual ways, including inference from circumstantial evidence." *Id.* at 842. In this case, a plethora of circumstantial evidence could lead a reasonable

jury to infer that the County was aware of the risk that its policies presented.

First, a jury could conclude that County policymakers knew that inevitably some prisoners arrive at the jail with urgent health problems requiring hospitalization. The fact that County policy requires that detainees be checked for medical conditions requiring immediate attention indicates such knowledge.

Second, the County's policies make it clear that policymakers were keenly aware that mental illness, and manic phases in particular, were within the range of health problems that would sometimes require urgent care. In addition, the policies reveal that the policymakers knew that people in a manic state will sometimes be combative.

Significantly, the County had a detailed policy concerning the administration of psychotropic drugs that, *inter alia*, provides that such drugs must sometimes be forcefully administered on an emergency basis because an imminent danger to the prisoner or others might exist.[14] In addition, County policy requires placing "inmates with mental disorders that become combative [or] violent" in special watch cells. Another policy requires frequent checking of prisoners in medical unit cells "who are violent, mentally disordered, or demonstrating bizarre/unusual behavior." And still another policy requires the presence of

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14. This portion of the psychotropic drug policy states: "Pyschotropic medications will not be forcefully administered by healthcare staff unless a court order exists or there is imminent danger to self or others."

a mental health technician to be present at the jail five days a week. Additional testimony by Sheriff Kirkland further indicates that the policymakers knew that they needed to deal safely and effectively with the special challenges posed by the mentally ill: "Certainly it's well-known that the Washoe County jail is the second or third largest houser of people who have mental difficulties in the state, including the Nevada Mental Health Institute."

Third, the record suggests that the County not only knew that it had to treat the mentally ill in order to avoid harm, but that it had made a practice of ignoring this need. Until 1995, the County had a full-time mental health professional on site at the jail to perform mental health screenings of detainees. A reasonable jury could infer that this program existed because the County had recognized that it needed such a program in order to provide adequate mental health care to detainees and to avoid serious harm caused by the lack of such care. In 1995, the County dropped its mental health professional position — and did not fill it for four years — not because jail policymakers concluded it was unnecessary, but, according to the record before us, because of what Sheriff Kirkland described as "a very bad relationship" between state psychiatric hospital officials who supplied the psychiatric personnel, the jail's medical staff, and the sheriff's department. That the County tolerated such a long lapse in this service for such a trivial and arbitrary reason as a personality conflict demonstrates that the County chose to ignore the acknowledged mental health needs of detainees.[15]

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15. The record is not clear about the precise role of the mental health screening professional. If the job description's duties included screening incoming detainees for mental illness, then all the more basis exists to conclude that the County knew of the need to screen incoming detainees for mental illness and chose to ignore it.

We note that the question of whether the County policies violated Gibson's rights does not hinge on whether County policymakers knew that the County's policies would pose a substantial risk of serious harm to *Gibson*, in particular. As long as a jury can infer that the policymakers knew that their policy of not screening certain incoming detainees would pose a risk to someone in Gibson's situation, we must reverse the summary judgment in favor of the County. *Farmer*, 511 U.S. at 843-44 ("it does not matter . . . whether a prisoner faces an excessive risk . . . for reasons personal to him or because all prisoners in his situation face such a risk" and when prison officials know of rampant inmate rape and do nothing about it, "it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom"); *Redman*, 942 F.2d at 1448.

The County emphasizes the facts that Gibson had an unhealthy heart and that his autopsy listed severe coronary arteriosclerosis as the cause of his death. As a result, the County argues that it was not deliberately indifferent to Gibson's serious medical need because "[t]he serious medical need at issue in this case was Mr. Gibson's coronary disease, not his mental health condition."

This argument is, as we understand it, not one about causation — on the summary judgment record a jury easily could conclude that the County caused Gibson's death. Indeed, the County's medical expert Dr. Charles Welti recognized that Gibson's "physiologically stressful state" resulted in Gibson's fatal heart attack.

Instead, the County's argument is about foreseeability: Even if the County was deliberately indifferent to Gibson's

mental health condition, this deliberate indifference did not cause Gibson's death because the County neither knew nor had reason to know that a fatal heart attack would result from ignoring Gibson's severe mental health condition.

We reject this argument for two reasons. In the first place, there is sufficient evidence in the record on which a jury could find that death *is* a foreseeable result of not treating a manic person and placing him in a penal setting. As noted earlier, in an interview with the Nevada Department of Investigation, Dr. Tannenbaum testified that an untreated person in a manic state "can easily die in a prison system,"[16] and that a rapid pulse and increased blood pressure are commonly associated with manic bouts. Although the precise way in which Gibson died may not have been foreseeable, the extreme stress on Gibson's system and the possibility that this stress would trigger a fatal reaction of some sort were foreseeable.

Second, even if the County is correct that death was not a foreseeable consequence of its deliberate indifference, this argument does not exonerate the County. Death was not the only injury Gibson suffered at the hands of the County. Instead of attending to Gibson's serious medical needs, the County reacted to Gibson's illness by locking him in a cell, pepper spraying him, shackling him for several hours by the hands, feet, and waist, dragging him through the corridor, and having two deputies climb on top of him.

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16. It appears from the transcript of this interview that Dr. Tannenbaum elaborated on this possibility. However, because this transcript of the interview is only partly legible, an accurate quotation of this elaboration is not possible.

The likely result, a jury could find, was severe psychological and physiological distress. A plaintiff may recover from a municipality for far less severe injuries in a suit of this nature. *Cf. Canton*, 489 U.S. at 381 (allowing cause of action for failure to provide medical care action to proceed when municipal officials left a woman with severe emotional ailments lying on a police station floor for an hour).

In addition, these injuries were indisputably foreseeable. Uncontrollable behavior is a foreseeable consequence of not identifying a manic condition, and having to chain, pepper spray and drag someone, with attendant psychological and physiological harm, is a foreseeable consequence of dealing with someone who is out of control.

The "time-honored legal principle that a wrongdoer takes his victim as he finds him" means that if the County is liable for Gibson's other injuries it also must bear liability for Gibson's death. *Wakefield v. Nat'l Labor Relations Bd.*, 779 F.2d 1437, 1438 (9th Cir. 1986). Sometimes referred to as the "eggshell skull" doctrine, this principle renders defendants liable for any physical injury they cause, no matter how unforeseeable, once they inflict harm on a plaintiff's body. As a leading torts hornbook states:

> There is almost universal agreement upon liability beyond the risk, for quite unforeseeable consequences, when they follow an impact upon the person of the plaintiff.
>
> It is as if a magic circle were drawn about the person, and one who breaks it, even by so much

> as a cut on the finger, becomes liable for all resulting harm to the person, although it may be death. . . . The defendant is held liable for unusual results of personal injuries which are regarded as unforeseeable, such as . . . heart disease. . . . The defendant of course is liable only for the extent to which the defendant's conduct has resulted in an aggravation of the pre-existing condition, and not for the condition as it was; but as to the aggravation, foreseeability is not a factor.

W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 43 at 291-92.

Because "§ 1983 creates a species of tort liability" the Supreme Court "has interpreted the statute in light of the background of tort liability." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 783 n.34 (9th Cir. 2000) (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999)), *aff'd*, No. 00-1167, 2002 WL 654431, __ U.S. __ (Apr. 23, 2002). We see no reason for diverging from the Supreme Court's general guidance in this situation. Although the deliberate indifference doctrine contains a heightened foreseeability requirement, this requirement differs from the traditional negligence foreseeability requirement only insofar as deliberate indifference requires the defendant to be *subjectively* aware that *serious* harm is likely to result from a failure to provide medical care. But the deliberate indifference doctrine does not require that a *particular* consequence be more predictable than is required under traditional tort law. Accordingly, the First Circuit has approved

of the use of the eggshell skull doctrine in a § 1983 case with similar facts. *Figueroa-Torres v. Toledo-Davila*, 232 F.3d 270, 274-76 (1st Cir. 2000) (police officers may be liable for death of a person with a diseased and enlarged spleen even though the death was not a foreseeable consequence of the police's hitting and kicking).[17]

For the above reasons, the County's policies posed a substantial risk of serious harm to Gibson, and enough circumstantial evidence exists that a reasonable jury could infer that County policymakers knew that this risk existed and chose to ignore it.

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17. The pattern of lapses in communicating the ATLs in this case is regrettable, and probably negligent, but, under these facts, it does not violate Gibson's substantive due process rights. With some exceptions, including when a person is in police custody or when an officer's conduct places a person in peril, "[t]he 14th Amendment does not generally require police officers to provide medical assistance to private citizens." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997) (citing *DeShaney*, 489 U.S. at 197). Thus, prior to Gibson's arrest, the police had no duty to provide medical assistance to Gibson. As a result, the County's deficient system for communicating ATLs cannot be the basis for a violation of Gibson's right to receive medical services prior to Gibson's arrest.

Once the police arrested Gibson, however, he was in police custody and the police did have a duty not to remain deliberately indifferent to his serious medical needs. *DeShaney*, 489 U.S. at 199-200. But no evidence supports the inference that the County's policymakers knew that the County's defective policies for communicating police dispatches between shifts and between field and jail employees created a substantial risk of serious medical harm to those people placed in police custody. *Farmer*, 511 U.S. at 842.

Appendix A

C. The Second Route to Municipal Liability

To impose liability against the County under *Canton*, a plaintiff must show: (1) that a County employee violated Gibson's rights; (2) that the County has customs or policies that amount to deliberate indifference (as that phrase is defined by *Canton*); and (3) that these policies were the moving force behind the employee's violation of Gibson's constitutional rights, in the sense that the County could have prevented the violation with an appropriate policy. *Amos v. City of Page*, 257 F.3d 1086, 1094 (9th Cir. 2001).

1. A County Employee Violated Gibson's Rights

As the record now stands, a jury could find that the nurse who was on duty at the jail on the night of Gibson's death was deliberately indifferent to Gibson's serious medical needs. As discussed above, for the nurse to have been deliberately indifferent (as the phrase is defined by *Farmer*) to Gibson's needs, she must have been aware of a substantial risk of serious harm. *Farmer*, 511 U.S. at 837; *Frost*, 152 F.3d at 1128-30.

A jury could find that the nurse knew that Gibson was in the throes of a manic state on the basis of three facts: she had medical training, she knew that Gibson was exhibiting behavior consistent with mental illness,[18] and she knew that

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18. When asked if he told the medical staff that Gibson was "demonstrating bizarre behavior consistent with someone who was mentally ill," Deputy Hodges responded: "Yes, they would have known the story because he was combative at that time. . . .

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Gibson possessed psychotropic medication "that would stabilize somebody." A jury could also conclude that a trained nurse would know that hospitalization could have relieved Gibson's condition, and that if Gibson remained in jail, he presented a danger both to himself and to others. If the nurse knew that a substantial risk to Gibson's health existed and she declined to act upon this knowledge, she was deliberately indifferent to Gibson's constitutional right to receive medical care.

2. Deliberate Indifference under Canton

A jury could find, on the present record, that the nurse's constitutional violation arguably resulted from an omission in the County's policy regarding the handling of prescription medication.[19]

In *Canton*, the Supreme Court held that a "failure to train" police officers may serve as the basis for liability under § 1983 "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388. Policies of omission

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[W]e were telling everybody what happened, you know, with the mood swings in particular. I don't know how much detail I would have went into. I would have mentioned the mood swings. To me, that was the significant factor."

19. As was her prerogative, Ms. Gibson did not name the nurse as a defendant. This fact does not affect our determination that the nurse may have committed a constitutional violation and, in the event that she did, whether the County is legally responsible for that violation.

regarding the supervision of employees, then, can be "policies" or "customs" that create municipal liability under *Monell*, but only if the omission "reflects a 'deliberate' or 'conscious' choice" to countenance the possibility of a constitutional violation. *Id.* at 389-90; *see also Oviatt*, 954 F.2d at 1474 ("[A] local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights."). A jury may infer that a municipality made such a deliberate choice "when a municipal actor disregarded a known or obvious consequence of his action." *Board of County Comm'rs*, 520 U.S. at 410. Whether a local government has displayed a policy of deliberate indifference to the constitutional rights of its citizens is generally a jury question. *Oviatt*, 954 F.2d at 1478; *Blair v. City of Pomona*, 223 F.3d 1074, 1079 (9th Cir. 2000).

The *Canton* Court recognized that when the needto remedy the omission "is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, . . . the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390. The need to act may be obvious because any reasonable person would recognize the need; for example, because armed officers will often arrest fleeing felons, it is obvious that a municipality must train its officers in the constitutional limitations on the use of deadly force. *Id.* at 390 n.10. Unlike the deliberate indifference standard used to determine if a violation of a detainee's right to receive medical care took place, this standard does not contain a subjective component. *Farmer*, 511 U.S. at 841. As a result, there is no need for Ms. Gibson to prove that the County policymakers actually knew that their omissions would likely result in a constitutional violation.

In this case, the County had a policy that required the arresting officers to give the nurse any prescription medications found with an incoming detainee. The policy further required the nurse to either place the medications in "secured property or in the Infirmary for follow up care." Significantly, the policy failed to suggest that the nurse should act on any information that the medication might bear, even in the event that the nurse was unable to perform a medical evaluation because city policy precluded medical evaluations when the detainee is uncooperative, combative, or intoxicated.

A jury could also find that this omission was sufficiently likely to result in the violation of a detainee's right to medical care that the County was deliberately indifferent to these needs. As discussed above, County officials actually knew that some detainees who arrived at the jail would have urgent medical and mental health needs requiring immediate hospitalization. The policymakers also knew that people suffering from mental illness are sometimes combative. In addition, the County had created a mental health screening position, so policymakers knew that jail employees needed to identify and address mental illnesses in order not to neglect the medical needs of prisoners.

Given that the County policymakers actually knew that the jail staff would regularly have to respond to detainee mental health needs, it should have been obvious that the County's omission could well result in a constitutional violation.[20]

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20. *Canton* itself concerned a claim that the defendant City had failed to train its police officers in dealing with the emotionally disturbed. Concurring in part and dissenting in part, Justice O'Connor

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Because county policy forbids medical evaluations on incoming detainees who are combative and uncooperative, it was obvious that someone who had a mental illness that made them combative and uncooperative would not be evaluated. If, however, a combative detainee arrives with prescription psychotropic medication in their own name, there is an alternative way to identify those with medical needs. Although a jury could conclude that the nurse actually did identify Gibson as a person in need of mental health treatment, the County's medication policy did not instruct her to act upon this realization. When policymakers know that their medical staff members will encounter those with urgent mental health needs yet fail to provide for the identification of those needs, it is obvious that a constitutional violation could well result.

3. Moving Force

Having determined that summary judgment is inappropriate on the question whether the County's omission amounted to deliberate indifference to the constitutional rights of citizens

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wrote that "the diagnosis of mental illness is not one of the 'usual and recurring situations with which [the police] must deal,' " . . . such that lack of training therein would be "the kind of omission that can be characterized, in and of itself, as a 'deliberate indifference' to constitutional rights." 489 U.S. at 397 (O'Connor, J., concurring in part and dissenting in part) (citing *Canton*, 489 U.S. at 391). Even if this claim is correct in the absence of a record to the contrary, it is not correct on the record in this case. Sheriff Kirkland testified that the Washoe County jail housed more mentally ill people than all but a handful of Nevada institutions. As a result, whatever can be said of jails in general, the necessity of diagnosing mental illness is a usual and recurring situation in the Washoe County jail.

with whom the sheriff's department came into contact, we must consider whether these omissions were the "moving force" behind the violation of Gibson's constitutional rights. We find that there is sufficient evidence to preclude summary judgment on this question as well.

In order to be a "moving force" behind Gibson's injury, we must find that the "identified deficiency" in the County's policies is "closely related to the ultimate injury." *Canton*, 489 U.S. at 391; *see also Oviatt*, 954 F.2d at 1478. The plaintiff's burden is to establish "that the injury would have been avoided" had the County had a policy directing its medical staff to use information obtained from prisoner's medication to determine whether he should be jailed or hospitalized and, if the former, under what conditions. *Oviatt*, 954 F.2d at 1478.

Had the County had a policy instructing the medical staff to use information obtained from a prisoner's medication to screen incoming detainees, the nurse, after observing Gibson's behavior in light of his medication, likely would have concluded that Gibson was in the midst of a manic phase and recommended transporting him to a mental hospital. There, Gibson could have received the treatment he needed, rather than face conditions that only made his outlook worse. Alternatively, the nurse could have considered administering the medication on an emergency basis.

Appendix A

II. Individual Deputies' Liability

A. Deliberate Indifference to Medical Needs

The individual defendants in this case were the sheriff's deputies who had contact with Gibson after he was admitted to the jail. Their behavior, while it proved fatal to Gibson, was not unconstitutional. The record does not support the conclusion that the individual defendant deputies were deliberately indifferent, under the subjective *Farmer* standard, to Gibson's mental health condition.

Of all the individual officers who had contact with Gibson on the night of his death, only Miranda and Hodges knew that Gibson's behavior might be connected to mental illness, because they found and discussed Gibson's prescription medications. Miranda and Hodges are not defendants, however, and there is no evidence that, upon bringing Gibson into the jail, they told any of the deputies there (as opposed to the nurse) about the medicine containers. Similarly, there is no evidence that, having received the medicine containers from Miranda and Hodges, the nurse on duty — also not a defendant — informed any of the individual deputy defendants that Gibson's medications suggested that he was mentally ill. According to the summary judgment record, only Deputy Bowlin was even aware that any drug containers came into the jail with Gibson, but he did not know what the medications were, or their purpose.

In short, all the deputies at the jail knew about Gibson's mental condition was what they could observe of his behavior. Although several remarked on his peculiar mood swings and

dramatic shifts from combativeness to compliance, there is no evidence that any of them actually knew that this behavior connoted serious, treatable mental illness. Nor can we say that Gibson was so obviously mentally ill that the deputies, who had received no training regarding the diagnosis and treatment of mental illness, must have known that Gibson was exhibiting symptoms of mental illness. The lapses in communication at the jail are hardly commendable, but the deputies who, because of these lapses, remained unaware of Gibson's mental condition cannot be held liable for having been "deliberately indifferent" to it. *See Farmer*, 511 U.S. at 838.

B. *Excessive Force*

Ms. Gibson claims that the individual defendant deputies used excessive force in restraining Gibson, resulting in his death. The magistrate found that the force used by the deputies was reasonable, and therefore, that the defendants were not liable. We agree.

The Due Process clause protects pretrial detainees from the use of excessive force that amounts to punishment. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). Although the Supreme Court has not expressly decided whether the Fourth Amendment's prohibition on unreasonable searches and seizures continues to protect individuals during pretrial detention, *id.*, we have determined that the Fourth Amendment sets the "applicable constitutional limitations" for considering claims of excessive force during pretrial detention. *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996),

cert. denied, 519 U.S. 1006 (1996). *Graham* therefore explicates the standards applicable to a pretrial detention excessive force claim in this circuit.

In *Graham*, the Supreme Court explained that determining whether a defendant officer's use of force was "reasonable" under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." 490 U.S. at 396 (internal quotations omitted). This analysis requires "careful attention to the facts and circumstances in each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.; see also Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (whether seizure is reasonable under the Fourth Amendment is judged by the "totality of the circumstances").[21]

Finally, the *Graham* Court admonished courts to examine the circumstances underlying a Fourth Amendment claim from the viewpoint of the reasonable officer on the scene, "rather than with the 20/20 vision of hindsight." 490 U.S. at 396. For, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are

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21. In the context of pretrial detention rather than arrest, it is clear that all the factors mentioned in *Graham* — whether the suspect is resisting arrest or attempting to flee, for example — will not necessarily be relevant.

tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Applying these standards to the case before us, we conclude that the individual defendant deputies cannot be held liable for the use of excessive force against Gibson. From the moment Gibson arrived at the jail, he was struggling against the deputies, hurling invective, and generally behaving very strangely and violently. Because we have determined that there is no proof the deputies on duty at the jail were aware that Gibson's behavior was connected to his treatable mental illness, we cannot hold them accountable for having treated Gibson as a dangerous prisoner rather than a sick one, despite the tragic consequences of this error.

Given that perspective at the time, the deputies' conduct that night was reasonable. Because he was alone in his holding cell when he slipped out of his waist chain and began banging it against the window, Gibson — at that point — posed no immediate danger to anyone but himself. But Sgt. Williams was concerned that Gibson might shatter the window in his cell door, thereby placing both himself and any officers who might have to enter the cell at risk of harm. The decision to enter Gibson's cell and restrain him was therefore reasonable.

Moreover, once the deputies began to restrain Gibson and move him to the special watch cell, he fought back vigorously. No more than three minutes passed from the time the deputies brought Gibson into the special watch cell and his death. During that time, Gibson was fighting hard against the deputies' efforts to restrain him, creating precisely the

kind of situation in which officers must make split-second decisions. Under all the circumstances, the deputies' decisions under these difficult circumstances resulted in restraining Gibson no more forcefully than was reasonably necessary. We therefore affirm the district court's grant of summary judgment for the individual deputy defendants and Sgt. Williams.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Each party to bear its own costs on appeal.

REINHARDT, Circuit Judge, concurring:

While I concur fully in the court's opinion, I write separately to expand on a point that the opinion relegates to a footnote (n.9). Although *Farmer v. Brennan*, 511 U.S. 825 (1994), establishes a subjective test for determining deliberate indifference in the case of individual defendants, in that case the Supreme Court made it reasonably clear that the same standard does not apply in actions against government entities involving the adoption of affirmative government policies. The *Farmer* Court stated that, while a subjective standard is appropriate for determining the liability of prison officials, "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official." *Id.* at 841.

Here, whether we import the more stringent *Farmer* subjective standard or apply the less stringent objective standard employed in *City of Canton v. Harris*, 489 U.S. 378,

388-89 (1989),[1] the record, when viewed in the light most favorable to Ms. Gibson, shows that the County's failure to respond to her husband's medical needs was a direct result of an affirmative County policy that demonstrated deliberate indifference to this need. Thus, there is no cause in this case to resolve definitively the question of which standard applies to the County, regardless of how obvious the answer may be. We can instead, for purposes of this decision, simply apply the more stringent standard.

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1. *See also Farmer*, 511 U.S. at 841 ("It would be hard to describe the *Canton* understanding of deliberate indifference . . . as anything but objective. *Canton*'s objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases.").

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA DATED SEPTEMBER 29, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CASE NUMBER: CV-N-97-410-DWH(RAM)

MICHELLE GIBSON et al.,

Plaintiffs,

V.

WASHOE COUNTY, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

XX **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

Appendix B

IT IS ORDERED AND ADJUDGED that Summary Judgment is granted in favor of the Defendants and against the Plaintiffs.

September 29, 1999
Date

LANCE S. WILSON
Clerk

s/ Marcia K. Cooper
MARCIA K. COOPER
(By) Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA DATED SEPTEMBER 27, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-97-410-DWH(RAM)

MICHELLE GIBSON,

Plaintiff,

vs.

WASHOE COUNTY,

Defendant.

ORDER

Before the court are plaintiff's objections (#43) to the magistrate judge's recommendation that defendant's motion (#24) for summary judgment be granted. The matters objected to will be considered *de novo.* 28 U.S.C. § 636(b)(1).

Virtually all of plaintiff's objections document (#43) is directed to a recitation of plaintiff's factual assertions. Following this, plaintiff urges two points, the first dealing with the treatment of "attempts to locate" messages and the second that negligent emergency treatment to one in custody creates a triable issue of deliberate indifference.

Appendix C

Plaintiff urges that her position that the county had a policy relating to communicating to the officers in the field so-called "attempts to locate" message that amounted to deliberate indifference to whether the messages are received and acted upon, was supported by more than merely an expert's (Van Bloucon's) opinion. The other evidence was that responses to "wants and warrants requests" did not automatically include "attempts to locate.". At best, however, this is probative only of negligence, not of deliberate indifference.

Plaintiff also objects that the cases relied upon by the magistrate judge for the proposition that inadequate or incompetent emergency service does not rise to the level of a constitutional violation are inapposite because the emergency services there were not given to persons in custody. Plaintiff does not explain why this distinction makes any difference.

The balance of plaintiff's objections merely express disagreement with the balance of the magistrate judge's recommendation and report and repeats the arguments set forth in her opposition to the motion the magistrate judge addressed in his report and recommendation.

After *de novo* review, the magistrate judge's report and recommendation is accepted in whole.

IT IS THEREFORE ORDERED that defendant's motion (#24) for summary judgment is *GRANTED*. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that the pending motion (#25) *in limine* is *DENIED* as moot.

DATED: This 27th day of September, 1999.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX D — REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE DATED AND FILED SEPTEMBER 7, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-97-410-DWH (RAM)

MICHELLE GIBSON, et al.,

Plaintiffs,

vs.

COUNTY OF WASHOE, et al.,

Defendants.

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This matter has been referred to the undersigned Magistrate Judge by the Honorable David W. Hagen, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. The matter is before the court on Defendants' Motion for Summary Judgment (Doc. #24). Plaintiff has filed an Opposition to Defendant's Motion for Summary Judgment (Doc. #30) and Defendants have replied (Doc. #35). The court heard oral argument on the Motion on August 9, 1999.

Appendix D

I. BACKGROUND

Viewing the facts most favorable to the Plaintiff, the following facts are undisputed. In early 1996, Stephen Gibson (decedent) was the 39-year-old husband of Plaintiff Michelle Gibson and the father of two minor children. Although the decedent suffered from severe arteriosclerosis, he was apparently asymptomatic and neither decedent nor Plaintiff was aware that decedent had the condition. Decedent did, however, have a history of bi-polar disorder which had been diagnosed as manic depressive. He had received treatment for this condition and was prescribed medication. When decedent was in the manic phase of this condition he experienced episodes of violent and irrational behavior.

On January 31, 1996, decedent was exhibiting symptoms of the manic phase of his disorder. Plaintiff observed him packing his clothes and when she asked decedent about it he brandished a gun and a machete. The decedent left the house taking Plaintiff's car. The following day, February 1, 1996, Plaintiff moved to her mother's house. That afternoon Plaintiff called the Sparks Police Department and filed a missing person's report. That evening decedent called Plaintiff and sounded normal. Plaintiff then called the Washoe County Sheriff's Department and explained the situation to them, hoping to have decedent picked up and taken to the hospital to be evaluated. Washoe County Sheriff's Deputy Mike Matthews responded to this request and located the decedent at his residence. Deputy Matthews spoke to decedent who gave no indication of being a threat to himself or anyone else. Deputy Matthews also called Plaintiff, who requested that decedent be taken to West Hills Hospital. The Plaintiff did not inform Deputy Matthews that decedent

had threatened her, nor that he had episodes of irrational and violent behavior. Deputy Matthews spoke to the hospital and was advised that there were no doctor's orders to admit decedent to the hospital. Deputy Matthews took decedent to the Plaintiff to obtain his medication and, based on his observation that decedent was not a threat to himself or any third party, returned decedent to his residence.

On February 2, 1996, Plaintiff spoke with West Hills Hospital and the District Attorney's Office about getting decedent admitted to the hospital. Because of his recent activities she also obtained a Temporary Protective Order against decedent. That afternoon both Plaintiff and Dr. Rich spoke to 911 and lodged an "attempt to locate" the decedent. At approximately 3:29 p.m. an ATL was received by 911 describing decedent and advising that he might be carrying weapons. If he was located West Hills Hospital and Plaintiff were to be contacted. This ATL was updated at 4:21 p.m. with the information that decedent was manic depressive and had threatened to kill his wife, and again at 5:11 p.m. advising that the complainant was decedent's wife. This ATL was not broadcast to the Washoe County Sheriff's Department.

At 5:15 p.m. on February 2, 1996, another attempt to locate decedent was received and broadcast. It described decedent and advised that if located he was to be taken to West Hills Hospital per Dr. Rich for emergency commitment. This ATL was broadcast to Washoe County Sheriff's Department at 10:39 p.m. Deputies Miranda and Hodges logged on to the radio at 10:31 p.m. on February 2, 1996, but did not hear the 10:39 p.m. dispatch regarding the ATL. At approximately 3:00 a.m. on February 3, 1996, Deputies Miranda and Hodges encountered decedent at the Winner's

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Comer convenience store at the University Village Shopping Center and observed that decedent appeared somewhat disoriented, causing them to believe he may have been under the influence of alcohol, although they could not detect the odor of alcohol. Upon following the decedent from the convenience store, the deputies observed him commit a traffic offense and pulled him over. The decedent was belligerent at the scene of the traffic stop. The deputies found three bottles of prescription medication when they searched decedent's vehicle. Based upon the traffic offense, the expired registration and decedent's behavior, the deputies decided to arrest him. The decedent's belligerent behavior continued during the transport to the jail, and when they arrived at the jail, decedent refused to get out of the patrol car. He had to be physically removed from the car and carried to the jail.

At the jail, the decedent refused to cooperate with deputies and continued to struggle. He was placed in leg restraints and belly chains and carried to a holding cell. A fifteen minute cell check was initiated, and after approximately one hour, at approximately 4:30 a.m., it was discovered that decedent had slipped out of his belly chains and was hitting them against the cell door. Several deputies entered the holding cell and reattached the chains, putting them through the belt loops of the decedent's pants. The fifteen minute watches continued until approximately 6:00 a.m. when decedent again slipped out of his chains and was hitting them against the cell door. Decedent refused to obey commands to back away from the door and stop swinging the chains. The deputies then utilized pepper spray to subdue decedent, and although he was temporarily incapacitated, he quickly became physically combative and struggled mightily with the deputies.

A decision was made to move the decedent to a cell where he could be restrained on a bunk. During the transfer the decedent continued to struggle. Once in the cell he was placed face down on the bunk and an attempt made to restrain him. There were six deputies involved in this process and they were having little success accomplishing their mission because of decedent's herculean struggle, when suddenly decedent stopped struggling and went limp. Immediate efforts were made to revive decedent, but he was pronounced dead when he reached the hospital.

An autopsy was performed and John O'Donnell, M.D. found that decedent had an enlarged heart and severe blockage in the right coronary artery and left anterior descending coronary artery. In his opinion, the cause of death was severe coronary arteriosclerosis.

In the Amended Complaint Plaintiff alleges six causes of action; excessive force by deputies while in jail (1st Cause of Action); deliberate indifference to serious medical condition (2nd Cause of Action); failure to train (3rd Cause of Action); loss of consortium (4th Cause of Action); common law negligence (5th Cause of Action); and negligent hiring, training and supervision (6th Cause of Action).

II. DISCUSSION

A. Standard for Summary Judgment

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't*

of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary judgment where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.CivP. 56(c); *Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir. 1996). The court's function on a motion for summary judgment is not to make credibility determinations. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Thus, where reasonable minds could differ on the material facts at issue summary judgment is not appropriate. *Warren v. City of Carlsbad,* 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996).

On summary judgment, the moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials of the pleading but must set forth specific facts showing that there is a genuine issue for trial. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510. Although the parties may submit evidence in an inadmissible form, namely depositions, admissions, interrogatory answers and affidavits, only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P. 56(c); *Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Further, where there is a complete failure of proof concerning an essential element

of the nonmoving party's case, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex,* 477 U.S. at 323, 106 S.Ct. at 2552-53.

B. Federal Claims

Plaintiff claims that the evidence in this case supports a claim against the County and the supervisory Defendants based on a policy or practice that was deliberately indifferent to the rights of mentally disturbed citizens. Specifically, Plaintiff argues that the death of the decedent as a result of the inadequacies existing in the 911 system upon which citizens rely constituted a violation of the constitutional rights of the decedent under the due process clause.

Plaintiff first refers to the evidence surrounding the reporting of ATL's to local law enforcement and the failure to broadcast or otherwise disseminate this information so that the Sheriff's deputies who arrested decedent would have known of his condition. Plaintiff's theory starts with her police expert's opinion that there were inadequate policies for communicating ATL's. Plaintiff provides no evidence of any other instances of injuries or claimed violation of rights of mentally ill individuals as a result of the deficient communications system. She relies strictly on Mr. Van Blaricom's opinion. To establish that a policy constitutes deliberate indifference, ". . . plaintiffs must introduce more evidence than merely the opinion of an expert witness." *Snyder v. Trepagnier,* 142 F.3d 791, 799 (5th Cir. 1998). *See also Berry v. City of Detroit,* 25 F.3d 1342 (6th Cir. 1994), where the court criticized at great length and in great detail

the use of allowing an expert to testify that the failure to discipline constituted deliberate indifference. *Accord West by and through Norris v. Waymire*, 114 F.3d 646, 652 (7th Cir. 1997) ("The affidavit of the plaintiff's expert, a professor of criminal justice, while admissible to show that the Town had been negligent in its supervision of Waymire, was not admissible to show that this negligence constituted a municipal policy of refusing to protect teenage girls from the sexual depredations of the Town's police officers — a legal conclusion that an expert witness is not allowed to draw, . . . and an erroneous legal conclusion to boot, as well as (maybe because) one that exceeded the expert's professional competence, which was limited to describing sound professional standards and identifying departures from them.").

Moreover, the Due Process Clause "generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989). Applying this rule in the context of emergency services, courts have consistently held that the provision by the state of inadequate or incompetent emergency services does not rise to the level of a constitutional violation. *See, e.g., Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (Fire Department dispatcher made wrong diagnosis and failed to send rescue services), *cert. denied*, 489 U.S. 1065 (1989); *Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, 1036 (11th Cir. 1987) (ambulance responding to 911 call refused to take plaintiff to the hospital of her choice although she had requested an

ambulance that could take her to that hospital); *Handley v. City of Seagoville,* 798 F.Supp.1267, 1272 (N.D. Tex. 1992) (failure to provide emergency ambulance service); *Regalbuto v. City of Philadelphia,* 937 F.Supp. 374 (E.D. Pa. 1995) (allegations that inadequate training and supervision of emergency personnel caused delays in response time did not demonstrate a violation of a constitutional right).

Plaintiff does not allege any special relationship existed between Defendants and decedent or Plaintiff, and no discussion of that doctrine is necessary.

In light of the fact that Defendants owed no constitutional duty to decedent to provide adequate dispatch services and upon consideration of the above cases, we conclude that the failure of the dispatch services alleged in this case did not violate any substantive due process right of decedent or Plaintiff, and summary judgment is proper.

Plaintiff also claims that there was a failure to train deputies, on behalf of the Washoe County and Sheriff Kirkland, on how to deal with mentally ill persons and that this failure to train caused decedent's death. In *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) the Supreme Court explained that:

> "[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the City can reasonably be said to have been

> deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy or which the City is responsible, and for which the City may be held liable if it actually causes injury." (footnotes omitted).

The *City of Canton* case provides a Plaintiff two ways to establish liability in a failure to train case. First, a Plaintiff may establish deliberate indifference by demonstrating a failure to train officials in a specific area where there is an obvious need for training to avoid violation of citizen's constitutional rights (all of the Justices agreed that there is an obvious need to train police officers as to the constitutional limitations on the use of deadly force, *see Tennessee v. Garner*, 471 U.S. 1 (1985)), and that failure to so train would be so certain to result in constitutional violations as to reflect the "deliberate indifference" to constitutional rights required for the imposition of municipal liability. 489 U.S. at 390 n.10. Alternatively, a Plaintiff may rely on a pattern of unconstitutional conduct so pervasive as to imply actual or constructive knowledge on the part of policy makers, whose deliberate indifference, evidenced by a failure to correct once the need for training became obvious, would be attributable to the municipality. Justice O'Conner observed "The claim in this case — that police officers were inadequately trained in diagnosing the symptoms of emotional illness — falls far short of the kind of 'obvious' need for training that would support a finding of deliberate indifference to constitutional rights on the part of the City. . . . There are thus no clear constitutional guideposts for municipalities in this area, and the diagnosis of mental illness is not one of the 'usual and

recurring' situations with which [the police] must deal. *Ante*, at 391. The lack of training at issue here is not the kind of omission that can be characterized, in and of itself, as 'deliberate indifference' to constitutional rights." 489 U.S. at 397.

Since failure to train regarding dealing with citizen's emotional or mental illness is not so obvious as to result in a constitutional violation, in order to proceed on this theory, there must be evidence of a pattern of unconstitutional conduct resulting in injuries or unconstitutional treatment which would put the policy makers of Washoe County on notice of the need to train. Plaintiff has produced no such evidence and, therefore, summary judgment is appropriate on Plaintiff's claims based on failure to train regarding dealing with emotionally ill people both before and after the arrest.

Plaintiff also claims that Washoe County and its policy makers failed to train regarding restraint procedures. Although Plaintiff has conceded that the theories of positional asphyxia are no longer viable, she apparently is now relying on a theory of compression or restraint asphyxia. The failure to train analysis above is equally applicable to this claim and results in the same conclusion. In view of all of the recognized controversy surrounding the theories of positional, compression or restraint asphyxia, it cannot be said that the need to train in this area is so obvious that failure to do so would result in a violation of constitutional rights. Plaintiff has presented no evidence of other instances or a pattern of constitutional violations involving this theory that would put the County on notice of a need to train. *See Gusman*

v. Martinez, 1 F.Supp.2d 1240, 1260-61 (D. Kan. 1998). Summary judgment on this claim is appropriate.

While in the jail Plaintiff claims that Defendants were deliberately indifferent to decedent's constitutional rights to adequate mental health treatment. In *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), the Supreme Court distinguished the test for "deliberate indifference" established in City of Canton from the test required for culpability under the Eighth Amendment in prison condition cases:

> "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective. *Canton*'s objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases."

Id. at 1980-81.

The court held "that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 1984. This Eighth Amendment deliberate indifference standard applies to pretrial detainees. *Johnson v. Meltzer,* 134 F.3d 1393 (9th Cir. 1998).

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Although Plaintiff attempts to shift the focus to decedent's mental health, that is not what resulted in his death. There is no evidence in this record and no testimony from any expert that a risk of failing to adequately treat manic depressive disorder is death because of arteriosclerotic disease. The risk of harm in this case was causing a person with decedent's arteriosclerotic condition to be under a great deal of physical stress or exertion. No one involved in this case, Plaintiff, decedent or any of the Defendants were aware of this risk. Without such knowledge there can be no deliberate indifference on the part of Defendants to decedent's medical needs and summary judgment is appropriate.

Plaintiff's final federal claim is that Defendants used excessive force moving him from the holding cell and attempting to restrain him. Excessive force claims are analyzed under the Fourth Amendment "objective reasonableness" standard which balances "the nature and quality of the intrusion" against the "countervailing governmental interests at stake." *See, Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989); *Forrester v. City of San Diego,* 25 F.3d 804, 806 (9th Cir. 1994), *cert. denied,* 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1070 (1995). The objective reasonableness standard must be analyzed in light of the particular circumstances, "from the prospective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Graham* at 396, 109 S.Ct. at 1872. Factors to consider include: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of officers and others; and (3) whether the suspect actively resists detention or attempts to escape. *Id.* (quoting *Tennessee v. Garner,* 471 U.S. 1 8-9,

105 S.Ct. 1694, 1699-1700, 85 L.Ed.2d 1 (1985)); *see also Liston v. County of Riverside,* 120 F.3d 965, 976 (9th Cir. 1997). While the reasonableness of force is ordinarily a question of fact for the jury, summary judgment is appropriate, "where the district court concludes, after resolving all factual issues in favor of the plaintiff that the officers use of force was objectively reasonable under the circumstances." *Liston,* 120 F.3d at 976 n.10 (citations omitted).

In this case, unlike most, the court has the advantage of a videotape which shows the amount of force being used by Defendants. The decedent was struggling when he was admitted to the jail. He had twice slipped out of his chains and was beating the door of the holding cell with the chains. He would not follow directions of the officers and had to be sprayed with pepper spray. He was struggling and resisting the attempts of the deputies to restrain him to the bunk. The deputies used only their strength and their weight to subdue the decedent long enough to attach the restraints. During this time the decedent was resisting mightily. Viewing these facts in a light most favorable to the Plaintiff, we believe that the force utilized was reasonable under the circumstances and summary judgment on this claim is appropriate.

C. State Claims

In addition to the federal claims, Plaintiff asserts two causes of action for negligence. She admits in her Opposition to the Motion for Summary Judgment that the sixth cause of action is without validity (Doc. #30, p. 27, 1. 12-18), leaving only one negligence claim against the Defendants.

Whether or not supplemental jurisdiction should be exercised is within the court's discretion. *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992), *cert. denied,* 507 U.S. 1004 (1993).

Section 1367(c) of 28 U.S.C. provides that a district court may decline to exercise supplemental jurisdiction over a claim in four circumstances, one of which is when the district court dismisses all claims over which it has original jurisdiction. *Harris v. Joint School Dist. No. 241,* 41 F.3d 447, 449 (9th Cir. 1994). "[I]n the usual case in which federal-law claims are eliminated before trial, the balance of the factors of economy, convenience, fairness and commodity will point toward declining to exercise jurisdiction over state law claims." *O'Connor v. Nevada,* 27 F.3d 357, 363 (9th Cir. 1994), *cert. denied,* 63 U.S.L.W. 3690 (1995) (brackets omitted). After reviewing the relevant factors in this case, the court finds no compelling reason to exercise its supplemental jurisdiction and determines in the interests of comity and federalism that Plaintiff's one remaining state law claim should be heard in state court.

III. CONCLUSION

Viewing the facts in a light most favorable to the Plaintiff there are no material questions of fact concerning any of the Plaintiff's federal claims and summary judgment is therefore appropriate on the Plaintiff's First Cause of Action, Second Cause of Action, Third Cause of Action and Fourth Cause of Action. Since all of the federal claims should be dismissed, the court should not exercise supplemental jurisdiction over the remaining claims and the state claims should be dismissed without prejudice.

Appendix D

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Defendants' Motion for Summary Judgment as to the First Cause of Action, Second Cause of Action, Third Cause of Action and Fourth Cause of Action be **GRANTED**.

IT IS FURTHER RECOMMENDED that the District Court dismiss the Fifth Cause of Action and Sixth Cause of Action without prejudice to Plaintiff refiling those claims in state court.

The time to object to this Report and Recommendation pursuant to LR IB 3-2(a) is hereby shortened and Plaintiff shall have five (5) days in which to file and personally serve any objections. Defendants shall then have five (5) days from the date of service to file any points and authorities opposing the objections. NO EXTENSIONS OF TIME WILL BE GRANTED.

DATED: September 7, 1999.

s/ [illegible]
UNITED STATES MAGISTRATE JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED JULY 10, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-17338

D.C. No. CV-97-00410-DWH/RAM

MICHELLE GIBSON,

Plaintiff-Appellant

v.

COUNTY OF WASHOE, Nevada; RICHARD KIRKLAND, Washoe Co. Sheriff; RAY WRIGHT, Washoe Co. Chief Deputy Sheriff; JOHN WILLIAMS, Washoe Co. Supervising Sgt.; ROB BOWLIN; JEREME WORMINGTON; MICHELE YOUNGS; SCOTT THOMAS; ROBERT COOK; MARY JEAN CLOUD, individually and in their capacities as deputy sheriffs of Washoe Co.,

Defendants-Appellees

Before: REINHARDT, TASHIMA and BERZON, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing and petition for rehearing en banc.

Appendix E

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.